IN THE
Supreme Court of the United States
October Term, 1978
No. 78-1418

WILLIAM E. BLOOMER, JR.,
Petitioner,

-against-

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALAN C. RASSNER
Counsel of Record for Petitioner
15 Park Row
New York, N.Y. 10038
(212) 227-2618

SHAFTER & SHAFTER
Attorney for Petitioner

RASSNER, RASSNER & OLMAN
Of Counsel for Petitioner

DICK BAILEY PRINTERS, 290 RICHMOND AVE., S.I., N.Y. 10302
TEL.: (212) 447-5358

TABLE OF CONTENTS

APPENDICES

CASES CITED

STATUTES CITED

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978
No.

WILLIAM E. BLOOMER, JR.,
Petitioner,

-against-

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 586 F. 2d 908. The opinion of the District Court is reported at 448 F. Supp. 652.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed is dated October 13, 1978 and was entered the same day.

The orders denying rehearing and rehearing en banc were

dated and entered January 18, 1979.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED FOR REVIEW

When a longshoreman's suit against a shipowner results in a recovery exceeding the workmen's compensation lien, does the stevedore-employer (or compensation insurance carrier) recover its entire lien from the longshoreman's recovery, or must it share proportionately in the longshoreman's costs of obtaining that recovery, including attorney's fees?

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has rendered a decision in conflict with decisions by the United States Court of Appeals for the Fourth Circuit (*Swift v. Bolten,* 517 F. 2d 368 (1975) and the Fifth Circuit (*Mitchell v. Scheepvaart Maatschappij Trans-Ocean,* 579 F. 2d 1274 (1978), all of which have answered the question presented differently.

2. The Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.

STATUTES WHICH THE CASE INVOLVES

33 U.S.C. §905. Exclusiveness of Liability

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as

required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Mar. 4, 1927, c. 509, § 5, 44 Stat. 1426; Oct. 27, 1972, Pub. L. 92-576, § 18(a), 86 Stat. 1263.

33 U.S.C. §933. Compensation for Injuries Where Third Persons are Liable

Election of Remedies

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

Acceptance of Compensation Operating as Assignment

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

Payment Into Section 944 Fund Operating as Assignment

(c) The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

Institution of Proceedings or Compromise by Assignee

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

Recoveries by Assignee

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

Institution of Proceedings by Person Entitled to Compensation

(f) If the person entitled to compensation institutes proceedings within the period prescribed in subdivision (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

Compromise Obtained by Person Entitled to Compensation

(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if the written approval of such

compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

Subrogation

(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

Right to Cmopensation as Exclusive Remedy

(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided,* That this provision shall not affect the liability of a person other than an officer or employee of the employer.

Mar. 4, 1927, c. 509, § 33, 44 Stat. 1440; June 25, 1938, c. 568 §§ 12, 13, 52 Stat. 1168; Aug. 18, 1959, Pub. L. 86-171, 73 Stat. 391; Oct. 27, 1972, Pub. L. 92-576, § 15(f)-(h), 86 Stat. 1262.

STATEMENT OF THE CASE

This action was originally brought to recover damages for personal injuries sustained by petitioner on August 9, 1973 while working as a longshoreman aboard a vessel owned and operated by C. Y. TUNG and ECKERT OVERSEAS AGENCY, INC.[1] Jurisdiction was based on diversity of citizenship (28

1. These parties were named as defendants in the District Court. They have no interest in the outcome of this petition and have not been named as parties to this proceeding, pursuant to Rule 21 (4) of the Rules of this Court.

U.S.C. § 1332).

Petitioner was paid compensation benefits pursuant to the Longshoremen's and Harbor Workers' Compensation Act, (33 U.S.C. § 901 et seq.) by respondent, Liberty Mutual Insurance Company, the workmen's compensation insurance carrier for Connecticut Terminal Company, petitioner's employer. These benefits, including both disability payments and medical expenses, amounted to $17,152.83.

Counsel for petitioner and the shipowner agreed to a settlement of the action in the amount of $60,000, and while they were waiting for approval from their respective clients, Liberty Mutual Insurance Company requested permission from the District Court to intervene, which was granted.

Following approval of the settlement by both the petitioner and the shipowner, the petitioner moved for summary judgment on the intervenor's action for an order directing that the lien of Liberty Mutual Insurance Company for workman's compensation benefits be fixed in an amount so that it will bear proportionately with petitioner the costs of obtaining petitioner's recovery from the shipowner, including petitioner's attorney's fees.

This motion was denied and judgment was entered in favor of the intervenor, directing that it recoup its lien in full from the petitioner.[2] The Circuit Court affirmed.[3]

2. The distribution of the $60,000 pursuant to the lower Court's judgment was as follows:

Recovery	$60,000.00
less expenses	(202.80)
balance for distribution	$59,797.20
less fee of one-third	(19,932.40)
balance	$39,864.80
less entire lien of Liberty Mutual	(17,152.83)
net to Mr. Bloomer	$22,152.83

ARGUMENT

THE COURT OF APPEALS HAS RENDERED A DECSION IN CONFLICT WITH DECISIONS BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH AND FIFTH CIRCUITS.

Longshoremen injured on board vessels in the course of their employment receive benefits pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq.

Pursuant to 33 U.S.C. § 905 (b), when the longshoreman is injured as a result of negligence of the vessel's owner, he may bring a third-party action. However, the employer of the longshoreman (or its workmens' compensation insurance carrier) has a lien on the proceeds of the recovery in the third-party action (33 U.S.C. §933).

---

3. Had petitioner prevailed and Liberty Mutual Insurance Company been required to share proportionately with petitioner his cost of obtaining the recovery, the $60,000 would be distributed as follows:

Recovery		$60,000.00
less expenses		(202.80)
balance for distribution		$59,797.20
less fee of one-third		(19,932.40)
balance		$39,864.80
entire lien of Liberty Mutual	$17,152.83	
less proportionate share of fees and expenses (.3355866 x $17,152.83)*	(5,756.26)	
	$11,396.57	(11,396.57)
net to Mr. Bloomer		$28,468.23

* Expenses of litigation amounted to $202.80, and counsel fees were $19,932.40. Total cost to petitioner, therefore, of recovering $60,000 amounted to $20,135.20, or 33.55866% of the amount recovered.

If the longshoreman should fail to bring the action against a responsible shipowner within six (6) months after a compensation award, the employer may bring such action (33 U.S.C. § 933(b)).

Although experience has revealed that these actions are seldom brought by stevedore employers as they hesitate to sue shipowners with whom they do business, Congress has clearly set forth in 33 U.S.C. §933 (e) how the proceeds of these actions should be disbursed. The statute, however, does not set forth the manner of distribution of the recovery when suit is brought by the longshoreman himself, and the Courts have been required to fill this void.

This has resulted in a nice variety of methods of dealing with the question presented in this petition, as was recognized by the Court of Appeals (App. p. 6a-13a).

> "We are mindful of the prevailing conflict between the circuit courts of appeals on this very question. E.g., Cella v. Partenreederei MS Ravenna, 529 F. 2d 15 (1st Cir. 1975) cert. denied, 425 U.S. 975, 96 S. Ct. 2175, 48 L. Ed. 2d 799 (1976); Swift v. Bolten, 517 F. 2d 368 (4th Cir. 1975); Chouest v. A & P Boat Rentals, Inc. 472 F. 2d 1026 (5th Cir.) cert. denied 412 U.S. 949, 92 S. Ct. 3012, 37 L. Ed. 2d 1002 (1973)."

A clear conflict exists between the decision of the Second Circuit in the instant case and the decision by the United States Court of Appeals for the Fourth Circuit in *Swift v. Bolten,* 517 F.2d 368 (4th Cir. 1975).

In the *Swift* case, the Court noted that with the advent of the 1972 Amendment to the Longshoremen's and Harbor Workers' Compensation Act, the longshoreman's employer was no longer required to indemnify the shipowner for a judgment in favor of the longshoreman (33 U.S.C. §905) and stated at page 370:

> "The longshoreman and the stevedore now have a common interest in the maintenance of the third-party action and both stand to gain from it. If the action is brought by

the longshoreman, the stevedore can sustain no liability and it will secure a definite pecuniary advantage, if the action is successful. Provided that pecuniary advantage is secured through the services of counsel employed by the longshoreman, the stevedore should be taxed with that part of a reasonable fee for the longshoreman's counsel as is proportioned to its share of the recovery. This is the rule that has been adopted in similar instances and that accords with settled equitable principles."

* * *

"After all, had the longshoreman not filed the action, the insurance carrier would have been forced to file an action to recover of the shipowner for its payments and would have incurred attorney's fees payable out of its recovery. It suffers no injury if it is forced, as we hold, to bear its proportionate share of the attorney's fees when the longshoreman files the action and makes full recovery on its behalf."

A third method of dealing with the compensation lien has been set forth by the United States Court of Appeals for the Fifth Circuit in the case of *Mitchell v. Scheepvaart Maatschappij Trans-Ocean,* 579 F. 2d 1274 (decided September 14, 1978).

On facts similar to the case at bar, the Fifth Circuit held that in each case the Court should review the reasonableness of counsel's fee and then determine ". . . to what extent the difference between a reasonable fee for the gross recovery and the attorney's fee paid by the plaintiff may justly be taxed against the compensation carrier. In reaching its last determination, the court should take into account the extent to which efforts of the carrier's own counsel contributed to securing the final recovery, and the respective recoveries of the plaintiff and the employer. Obviously, the carrier should in no case be charged with a greater portion of counsel's fee than the carrier's share of the gross recovery." (p. 1281)

The Court went on to state at page 1282:

"No one has here challenged the reasonableness of one-third of the gross recovery in this case as counsel's fee for his total effort. However, the lower court stated in its opinion that the compensation carrier "did furnish assistance which helped conclude a prompt settlement in Mr. Mitchell's favor." We remand the case for a calculation of the carrier's appropriate contribution to counsel's fee given whatever efforts were provided by carrier's counsel."

See also *Cella v. Partenreederei MS Ravenna,* 529 F. 2d 15 (1st Cir. 1975) cert. denied, 425 U.S. 975, 96 S. Ct. 2175 (1976), which held that the lien holder need not contribute any portion of its lien towards the fees and costs of making the recovery and *Brown v. American Mail Line, Ltd.,* 437 F. Supp. 628 (DC Oregon 1977), which criticized the rationale of the *Cella* case, supra, and followed *Swift v. Bolten, supra.*

As a result of the above conflict, had Mr. Bloomer been injured in the Port of Richmond rather than at a Port in New London, Connecticut, he would have netted an additional $5,756.26 from his law suit. Had he been injured in the Port of New Orleans, he could not know what his net recovery would be prior to his agreeing to a settlement and a determination by a District Judge of the amount of the attorney's fee and lien.

It is petitioner's position that the approach adopted by the United States Court of Appeals for the Fourth Circuit as expressed in *Swift v. Bolten,* supra, is the most equitable and practical.

To compel the longshoreman to pay the entire attorney's fee when a portion of the recovery inures to the benefit of the compensation lien holder is simply unfair. *Valentino v. Rickners Rhederei, G.M.B.H. etc.* 417 F.S. 176, aff'd 552 F.2d 466 (2nd Cir. 1977).

The argument has been made that pursuant to 33 U.S.C.§933(d) and (e) when the action is brought by the employer (lienholder against the shipowner and a recovery is made, the employer retains from the proceeds of the recovery the expenses he incurred in bringing the action against the shipowner, including his attorney's fees and the full amount of his lien and

that, similarly, he should receive the full amount of his lien without deduction of attorneys fees when the employee (longshoreman) brings the action. The circumstances, however, are, as a practical matter, not the same.

If the employer brings the action, he must pay an attorney and risk the loss of the attorney's fee if the case is lost or the recovery small. He subjects himself to discovery proceedings and all of the other inconveniences which must be suffered by an active litigant. He may become liable to a judgment for costs. If the employer assumes these liabilities and responsibilities, he is entitled to the benefits of the statutory distribution set forth at 33 U.S.C. § 933(e).

When the longshoreman brings the action, however, the employer gets a completely free ride. He is not a litigant, incurs no costs or liability for indemnity (33 U.S.C. § 905) and, pursuant to the decision of the Court of Appeals, stands to recoup the full lien at the complete expense of the longshoreman.

The holding by the Fifth Circuit that a determination be made on an individual case basis by the District Judge as to whether or not the employer should share in the costs of obtaining the recovery is certainly more equitable than a complete denial of any sharing.

This procedure, however, which might necessitate a hearing, is burdensome and except possibly for an unusual situation in which there is a great deal of partaicipation by counsel for the employer, unnecessary.

The employer's lien is statutory and there is no need for intervention (33 U.S.C. §933). When the longshoreman brings the action, his attorney is ultimately responsible for its prosecution and trial and, as a practical matter, there are very few instances where counsel for the employer provides any assistance.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

As noted at the beginning of this argument, every longshoreman injured on board a vessel in the performance of his duties recovers compensation benefits and medical expenses pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq.

Whenever such an injured longshoreman commences an action against the shipowner to recover damages for the shipowner's negligence, the longshoreman's employer or its insurance carrier has a lien on the longshoreman's recovery (33 U.S.C. §933).

Even when the injured longshoreman negotiates settlement of his claim against the shipowner, without litigation, the longshoreman's employer or its insurance carrier has a lien on the recovery.

The question presented to this Court by this petition, therefore, involves an important question of unsettled federal law in that it affects each and every *case* or *claim* brought by longshoremen against vessel owners for injuries sustained and complements a Federal statutory scheme for disposition of these matters.

For this reason and the fact that there is a three-way split of authority among the Circuits, it is respectfully suggested that this petition for a writ of certiorari be granted.

Dated: March 2, 1979

Respectfully submitted,

ALAN C. RASSNER
15 Park Row
New York, N.Y. 10038
(212) 227-2618
Counsel of Record for Petitioner

SHAFTER & SHAFTER
Attorney for Petitioner

RASSNER, RASSNER & OLMAN
Of Counsel for Petitioner

APPENDIX A
JUDGMENT SOUGHT TO BE REVIEWED

CORRECTED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Thirteenth day of October, one thousand nine hundred and seventy-eight.

Present:
HON. J. EDWARD LUMBARD
HON. WALTER R. MANSFIELD
Circuit Judges

HON. JAMES S. HOLDEN
District Judge

WILLIAM E. BLOOMER, JR.,

Plaintiff-Appellant,

LIBERTY MUTUAL INSURANCE COMPANY as Subrogee of CONNECTICUT TERMINAL COMPANY,

Intervenor-Appellee,

vs.

C.Y. TUNG and ECKERT OVERSEAS AGENCY, INC.

Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO, Clerk
s/Arthur Heller
ARTHUR HELLER, Deputy Clerk

APPENDIX B
ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of January, one thousand nine hudnred and seventy-nine.

Present:
HON. J. EDWARD LUMBARD
HON. WALTER R. MANSFIELD
Circuit Judges

HON. JAMES S. HOLDEN
District Judge

WILLIAM E. BLOOMER, JR.,

Plaintiff-Appellant,

LIBERTY MUTUAL INSURANCE COMPANY as Subrogee of CONNECTICUT TERMINAL COMPANY,

Intervenor-Appellee,

vs.

C.Y. TUNG and ECKERT OVERSEAS AGENCY, INC.,
Defendants.

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

s/ A. Daniel Fusaro
A. DANIEL FUSARO, Clerk

APPENDIX C
ORDER DENYING REHEARING IN BANC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of January, one thousand nine hundred and seventy-nine.

WILLIAM E. BLOOMER, JR.,

Plaintiff-Appellant,

LIBERTY MUTUAL INSURANCE COMPANY as Subrogee of CONNECTICUT TERMINAL COMPANY,

Intervenor-Appellee,

vs.

C.Y. TUNG and ECKERT OVERSEAS AGENCY, INC.

Defendants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/Irving R. Kaufman
IRVING R. KAUFMAN, Chief Judge

APPENDIX D
OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1187—September Term, 1977.

(Argued: June 22, 1978 Decided: October 13, 1978.)

Docket No. 78-7204

WILLIAM E. BLOOMER, JR.,

Plaintiff-Appellant,

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,

Intervenor-Appellee,

—v.—

C. Y. TUNG and ECKERT OVERSEAS, AGENCY, INC.,

Defendants.

Before:

LUMBARD and MANSFIELD, *Circuit Judges,*
and HOLDEN, *District Judge.**

Appeal from an order of the Southern District of New York, Charles H. Tenney, *Judge,* denying appellant longshoreman's motion for summary judgment to allocate to the successful stevedore-employer-intervenor a proportionate share of the attorney's fees incurred by the appellant longshoreman as plaintiff in pursuing his claim against defendant shipowner to settlement. The district court ordered that attorney's fees were to be awarded first from the sum recovered by the plaintiff upon settlement with the defendant, and the intervenor was to be reimbursed in full for the compensation lien it holds pursuant to 33 U.S.C. § 933(h), the Longshoremen's and Harbor Workers' Compensation Act.

Affirmed.

* Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

SHAFTER & SHAFTER, New York, N.Y., *for Plaintiff-Appellant* (Rassner, Rassner & Olman, of counsel); Alan C. Rassner on the brief.

SEMEL, MCLAUGHLIN & BOECKMAN, New York, N.Y., *for Intervenor-Appellee* (Douglas A. Boeckman and John M. Dellacarpini, of counsel); Douglas A. Boeckman on the brief.

KIRLIN, CAMPBELL & KEATING, New York, N.Y., *for Defendants.*

PER CURIAM:

The plaintiff longshoreman settled his personal injury claim against the shipowner in the amount of $60,000. Prior to settlement the intervenor, Liberty Mutual, as the workmen's compensation carrier for the stevedore-employer, had paid the longshoreman $17,152.83 in compensation benefits and medical expenses under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* The question for review is whether the intervenor's reimbursement from the settlement fund must be reduced by a proportionate share of the long-

shoreman's costs, including the fees of his attorney. Judge Tenney denied the plaintiff's motion to apportion. The court ordered full reimbursement to the intervenor after deduction of the plaintiff's attorney's fees, none of which was charged to the intervenor. The remainder of the settlement funds then were awarded to the plaintiff as additional compensation.

The plaintiff appeals from that aspect of the order of the district court which held that the insurer was not required to pay a proportionate share of the plaintiff's legal fees but must be reimbursed in full for its lien of $17,152.83. Since we are persuaded that the district court correctly construed the Longshoremen's and Harbor Workers' Act, 33 U.S.C. § 933, as amended in 1972 by P.L. 92-576, 86 Stat. 1262, we affirm.

Prior to the 1972 amendment an injured longshoreman had a right of recovery against the shipowners for breach of warranty of seaworthiness, without establishing fault against the ship. *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, 94 (1946). Later the developing law in this area afforded the shipowner an opportunity to seek indemnity from the stevedore for breach of the stevedore's warranty of workmanlike performance owing to the ship. *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.,* 350 U.S. 124, 134 (1956). These judicial antecedents to the 1972 amendment had the effect of imposing strict liability on the stevedore for the personal injuries suffered by its employee. The consequent circuity of claims increased the expense incurred by the employer and decreased the ultimate compensation received by the injured longshoreman. *Valentino* v. *Rickners Rhederei, G.M.B.H., SS Etha,* 552 F.2d 466, 468 (2d Cir. 1977). Conflicts of interest between the worker and the employer intensified, making the stevedore an adversary against the employee's recovery

from the third party responsible for the injury. *See Id.* at 470. *Russo* v. *Flota Mercante Grancolombiana,* 303 F. Supp. 1404, 1407 (S.D.N.Y. 1969).

In 1972 the Congress became mindful of these consequences and, particularly, the growing inadequacy of the levels of compensation received by the injured workmen, resulting from the heavy drain imposed on the employer's resources by reason of third party litigation.

> The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in such cases.

H. Rep. No. 92-1441, 92d Cong., 2d Sess. in 3 U.S. Code Cong. & Admin. News, pp. 4698, 4702 (1972).

Accordingly, Congress eliminated the remedies for recovery available under the decisions in *Sieracki* and *Ryan.* The amended Act permits the injured longshoreman to receive compensation and also to maintain an action against the third party responsible for his injuries. He is allowed six months to commence suit. In the event he fails to commence the action within the appointed time and benefits have been paid him, the employer, or its

carrier, may maintain the action in its own behalf, as well as that of the injured employee. 33 U.S.C. §§ 933(b) & (h). If the subrogated action is successful the amount of the total recovery is allocated according to the statutory formula stated in § 933(e).[1] Thus, Congress has expressly provided that in a suit at the instance of the employer, or its carrier, the stevedore is entitled to full reimbursement of the compensation benefits paid to its employee, and its costs, including attorney's fees. The remainder of the excess, less one-fifth—"which shall belong to the employer"—shall be paid by the employer to the person entitled to compensation. 33 U.S.C. §§ 933(e)(1) & (2).

While the Act provides with particularity for the distribution of the fund recovered by way of judgment or settlement of the action pursued by the employer or its

1 33 U.S.C. § 933(c) reads:

> Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:
>
> (1) The employer shall retain an amount equal to—
>
> (A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);
>
> (B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;
>
> (C) all amounts paid as compensation;
>
> (D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and
>
> (2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

carrier, the Congress made no provision for the allocation of the funds recovered by the injured employee. Judge Tenney recognized that the statutory silence again burdened the court with making the allocation according to the statutory scheme as in *Valentino* v. *Rickners Rhederei, G.M.B.H., supra,* 552 F.2d at 468. The appellant contends that the rule formulated in *Valentino* controls the disposition of this appeal.

The applicable law reviewed in Judge Meskill's opinion in *Valentino* was written on a different slate. It was in the context of a litigated recovery by the longshoreman that was inadequate to satisfy the lien of the employer for compensation and medical expense previously paid. Because the $5,000 recovered by the longshoreman—"was insufficient to cover the lien of $15,488.13 for compensation and medical expenses, the employer claimed the entire recovery." *Id.* at 469. The court rejected the claim. This was done without disturbing the holding in *Fontana* v. *Pennsylvania R.R.*, 106 F.Supp. 461 (S.D.N.Y.), *aff'd sub nom. Fontana* v. *Grace Line, Inc.*, 205 F.2d 151 (2d Cir.), *cert. denied,* 346 U.S. 886 (1953). *Valentino, supra,* 552 F.2d at 470.

In *Fontana* the employee's settlement of his claim produced a fund that exceeded the cost of the litigation. The employee contended, as here, that the employer ought equitably to bear a proportion of his attorney's fees. Judge Weinfeld's opinion points out the statutory scheme opposed the contention.

> Thus, the Act treats the recovery as a fund charged first with the expense of the litigation and then with the amounts paid for compensation and medical expenses and the employee becomes entitled only to any excess finally remaining. There is no reason why a

> recovery obtained against the third party by the employee rather than the employer should be distributed differently. The expense of securing the recovery is, as in equity it should be, a first charge against the fund itself. As such it is immaterial whether the fund was created in a suit brought by the employer or one brought by the employee.

106 F.Supp. at 463-464.

We are mindful of the prevailing conflict between the circuit courts of appeals on this very question. *E.g. Cella* v. *Partenreederei MS Ravenna,* 529 F.2d 15 (1st Cir. 1975) *cert. denied* 425 U.S. 975 (1976); *Swift* v. *Bolten,* 517 F.2d 368 (4th Cir. 1925); *Chouest* v. *A & P Boat Rentals, Inc.,* 472 F.2d 1026 (5th Cir.) *cert. denied* 412 U.S. 949 (1973).[2] In the divergence of decisions we find Judge Coffin's explication in *Cella* of the statutory scheme more persuasive.

To be sure, the formula for distribution of the fund recovered through the efforts of the stevedore contained

---

2 In *Chouest* a prime factor in the allocation of attorney's fees was the conflict of interest aspect of the limited recovery in that instance. The court's opinion by Judge Wisdom stresses the point.

> It offends both our prior decisions and the spirit of fairness which they embody to suppose that Travelers could hammer away at the plaintiff's case without paying a reasonable fee for the services of the plaintiff's lawyer which resulted in Traveler's financial benefit. We hold that an employer intervenor who benefits from the plaintiff's recovery against a shipowner must compensate the plaintiff's lawyer for his efforts when, as here, the employer-intervenor's counsel, by virtue of his client's third party defense, adopts a position at the trial which is totally adverse to the plaintiff's cause.

472 F.2d at 1031.

> Reallocation need be undertaken only in very limited circumstances. . . . In the present case we hold that reallocation is likewise mandated where the intervenor's attorney contributes nothing of material assistance to the plaintiff's case, and instead devotes his efforts to undermining it.

472 F.2d at 1037.

in 33 U.S.C. § 933(e) does not specify the allocation of the recovery obtained by the injured employee, yet it unfolds the sense of the statutory purpose of the 1972 amendments—"to strictly limit the liability of the stevedore in order to husband its resources, and its insurance carrier's resources, for payment of the increased benefits under the Act." *Cella, supra,* 529 F.2d at 20.

The distribution of the fund ordered by the district court resulted in no windfall to the intervenor. It merely satisfied the statutory lien in keeping with the legislative purpose. It is consistent with the prior decision of this court in *Fontana, supra;* it is not at variance with the teaching in *Valentino, supra.* The order is affirmed.

APPENDIX E
MEMORANDUM

Docket Number 74 Civ 1422(CHT) Entered March 28, 1978
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM E. BLOOMER, JR.,

Plaintiff,

LIBERTY MUTUAL INSURANCE COMPANY
as subrogee of CONNECTICUT TERMINAL COMPANY,

Intervenor,

-against-

C.Y. TUNG and ECKERT OVERSEAS AGENCY, INC.,

Defendants.

APPEARANCES

For Plaintiff:
RASSNER, RASSNER and OLMAN
15 Park Row
New York, N.Y. 10038

Of Counsel: ALAN C. RASSNER, ESQ.

For Intervenor:
SEMEL, McLAUGHLIN & BOECKMANN
10 Rockefeller Plaza
New York, N.Y. 10020

Of Counsel: JOHN M. DELLICARPINI, ESQ.

TENNEY, J.

The individual plaintiff longshoreman was injured aboard defendants' vessel, instituted an action to recover for his injuries, and settled his claim against the defendants in the amount of $60,000. After the injury and before settlement, plaintiff was paid a total of $17,152.83 in workmen's compensation and medical benefits by his employer's subrogee, the intervenor Liberty Mutual Insurance Company. *See* Longshoremen's and Harbor Workers' Compensation Act ("Act"), 33 U.S.C. §§ 901 et seq. The statutory scheme contemplates that a lien arise in favor of the payor of any such compensation in case of a recovery against a third party. 33 U.S.C. § 933. Therefore, because plaintiff has recovered far in excess of his compensation benefits, the insurer will be fully reimbursed from the settlement fund.

The plaintiff has now moved this Court pursuant to Rule 56 of the Federal Rules of Civil Procedure ("Rules") for an order declaring that the insurer be required to bear a proportionate share of the attorney's fees incurred by the individual plaintiff in litigating his claim to settlement. Upon examination of the law in this Circuit, the Court concludes that the plaintiff's request must be denied.[1]

In 1972 the Congress restructured the laws governing work-related injuries to longshoremen and jettisoned cumbersome accretions to the prior law in favor of more certain and generous compensation to the protected class. After 1946 and until 1972, longshoremen had been permitted to invoke the unseaworthiness doctrine of liability without fault against the shipowner, *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946);

after 1956 the shipowner could seek indemnity from the stevedore based on a warranty of workmanlike performance. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). "The net result in most cases was that the stevedore became liable without fault for injuries to its employees." *Valentino v. Rickners Rhederei, G.M.B.H.*, 552 F.2d 466, 468 (2d Cir. 1977).

Since the 1972 amendments the *Sea Shipping* and *Ryan* doctrines have been abolished, and currently an injured longshoreman has six months in which to sue the shipowner for negligence, hoping to recover more than the compensation benefits he is still paid under the statutory scheme. In the event the longshoreman does not sue within six months, the stevedore may sue in the longshoreman's name. In the latter case the statute provides for the stevedore to retain from the judgment or settlement against the third party an amount equal to the compensation already paid out to the longshoreman, plus costs and attorney's fees. The excess, if any, is shared between stevedore and longshoreman according to a statutory formula. However, the statute is silent as to the distribution of the recovery in the event suit is brought by the longshoreman.

That silence confronted the United States Court of Appeals for the Second Circuit in *Valentino, supra,* forcing the court to formulate a rule "that complements the statutory scheme." 552 F.2d at 468. Although *Valentino* had quite different facts from the instant case, a close reading of the opinion and its juridical antecedents leads this Court to conclude that the theory it endorses is dispositive of these facts as well.

In *Valentino* the court of appeals was called upon to determine whether under the amended law attorney's fees would be paid out of the recovery where the longshoreman recovered *less* than the benefits already paid out by the stevedore. A decision in favor of deducting attorney's fees from the recovery would have meant that the stevedore's recoupment on its lien would be diminished and, in effect, that the stevedore would have paid for the longshoreman's attorney. The court below concluded

that the attorney should be paid from the recovery, *see Valentino v. Rickners Rhederei, G.m.B.H.*, 417 F. Supp. 176 (E.D.N.Y. 1976) (Weinstein, J.), and that decision was affirmed. However, the affirmance did not endorse Judge Weinstein's broad recommendation that a "rule of proportional sharing [should] apply to attorneys fees in longshoremen's suits no matter what the recovery." *Id.* at 178.

Of course, the proportional sharing theory is precisely what plaintiff is advocating here. The concept of proportional sharing is predicated on the fact that the 1972 amendments to the Act have allied the longshoreman and the stevedore is seeking recovery against a third party. A fortiori, it is contended that when the longshoreman sues, the stevedore should be required to pay pro rata for the services of the longshoreman's attorney, for it is through the latter's efforts that a recovery accrues out of which the stevedore recoups the compensation he paid to the longshoreman. However, although the court of appeals acknowledged in *Valentino* that "[t]he stevedore should not realize a windfall simply because its employee has chosen to exercise a right granted by Congress," 552 F.2d at 469, it did not endorse Judge Weinstein's theory of proportional sharing and instead hewed to principles enunciated in *Fantana v. Pennsylvania R.R.*, 106 F. Supp. 461 (S.D.N.Y. 1952) (Weinfeld, J.), *aff'd sub nom. Fontana v. Grace Line, Inc.*, 205 F.2d 151 (2d Cir.), *cert. denied,* 346 U.S. 886 (1953). In the course of its opinion the court of appeals overruled *Spano v. N.V. Stoomvaart Maatschappij "Nederland"*, 340 F. Supp. 1194 (S.D.N.Y. 1971), and *Russo v. Flota Mercante Grancolombiana,* 303 F. Supp. 1404 (S.D.N.Y. 1969), cases purporting to depend on *Fontana* for support.

This somewhat anomalous situation was explained by the *Valentino* court in the following way: In *Fontana* the plaintiff longshoreman sued and recovered only slightly more than what had been paid him in compensation; after satisfaction of the compensation lien and payment of attorney's fees, he would have had little or nothing for himself. Nevertheless, Judge

Weinfeld ruled that the statute "treats the recovery as a fund charged first with the expense of the litigation and then with the amounts paid for compensation and medical expenses" and that "[t]he expense of securing the recovery is . . . a first charge against the fund itself." 106 F. Supp. at 463-64, *quoted with emphasis in Valentino, supra,* 552 F.2d at 469-70. Judge Weinfeld saw no reason to distort the statutory plan simply because it was the longshoreman who sued and not the stevedore; consequently the employer received whole whatever he had paid in compensation and the longshoreman's attorney likewise received his fee from the recovery.

After the *Fontana* doctrine was enunciated, the Supreme Court issued the *Ryan* decision which gave the shipowner indemnity as against the stevedore. Thereafter the *Russo* and *Spano* cses arose. In those cases, as in *Valentino,* the fund recovered upon the longshoreman's suit was inadequate to reimburse the stevedore for compensation paid out. However, at this point in the development of the law it was often the stevedore who was funding the recovery under the *Ryan* indemnity doctrine. Thus, to have deducted attorney's fees from the recovery which, under *Ryan*, might be coming from one pocket of the stevedore only to be returned to the other pocket in satisfaction of the statutory lien was to "charge the stevedore for the privilege of being sued." *Valentino, supra,* 552 F.2d at 470. To avoid this inequity, the *Russo* and *Spano* courts fastened on that aspect of *Fontana* which construed the governing statute to first make the stevedore whole, *Spano, supra,* 240 F. Supp. at 1196, and the rule became one of primacy of the stevedore's lien over the attorney's lien where the longshoreman sued and there was a shortfall between recovery and compensation paid out. *Russo* and *Spano* made no reference to the fact that the Act contemplated only that scenario where the stevedore sued and was obliged to pay his own attorney's fees, or that the Act's concept of "making the stevedore whole," as construed in *Fontana,* included paying the attorney out of the fund recovered. Instead, *Russo* and *Spano* justified the fee

refusal on the theory that the attorney had produced no benefit for either his longshoreman client or for the stevedore, who was at this point indemnifying himself under *Ryan.*

When the Congress abolished the unseaworthiness and stevedore's indemnity doctrines in favor of direct negligence suits by the longshoreman or stevedore against the third party shipowner, the potential conflict of interest between the longshoreman and stevedore evaporated. The *Valentino* court therefore reasoned that the way was paved for overruling *Russo* and *Spano*[2] to permit attorney's fees to be deducted from the fund recovered from the third party, regardless of the amount of the fund. On the *Valentino* facts, *i.e.,* less recovery than compensation paid out, the stevedore had at least recouped some of what it had already paid, and that much only through the efforts of the longshoreman's attorney. Equity therefore dictated that "a lawyer who creates a fund for the benefit of another is entitled to reasonable compensation for his efforts." *Valentino, supra,* 552 F.2d at 468-69. Furthremore, although the instant facts were not before the court of appeals in *Valentino,* and although the *Valentino* court stated that *Fontana* "does not address the situation we have here, where the longshoreman does not share in the recovery and only the stevedore can pay," *id.* at 470, *Valentino* disposes of the facts sub judice with this statement: "[In disapproving *Russo* and *Spano*] we do not disturb Fontana's holding on the allocation of the attorney's fee *from the award." Id.* (emphasis added). Indeed, the allocation of the attorney's fee from the insufficient award in *Valentino* is entirely consistent with this Court's conclusion that the fundamental principle of *Fontana* has been affirmed sub silentio as to recoveries such as the one at bar which are adequate to reimburse the lienor and the attorney: it is the fund recovered that is charged—first for the cost of the recovery, including attorney's fees whether incurred by the longshoreman or the stevedore; next in reimbursement of the stevedore; and finally as additional compensation for the plaintiff longshoreman.

For the foregoing reasons, summary judgment is denied to the plaintiff and awarded instead to the intervenor Liberty Mutual Insurance Company as subrogee of the stevedore Connecticut Terminal Company. Attorney's fees are to be awarded first from the sum recovered by plaintiff upon settlement with the defendant, and the intervenor is to be reimbursed in full for the compensation lien it holds pursuant to 33 U.S.C. § 933(h).

Settle judgment on notice.

Dated: New York, New York
March 27, 1978

CHARLES H. TENNEY
U.S.D.J.

FOOTNOTES

1. There is a split of authority in the circuits which have addressed this question. *Compare Chouest v. A & P Boat Rentals, Inc.*, 472 F.2d 1026 (5th Cir.), *cert. denied,* 412 U.S. 949 (1973) (recovery exceeded stevedore's lien by modest sum; legal fees paid proportionately by plaintiff and lienor), *and Swift v. Bolten,* 517 F.2d 368 (4th Cir. 1975) (recovery ample to cover lien and attorney's fees with balance to longshoreman-plaintiff; proportional sharing of legal fees ordered), *with Cella v. Partenreederei MS Ravenna,* 529 F.2d 15 (1st Cir. 1975), *cert. denied,* 425 U.S. 975 (1976) (declining to follow *Swift, supra,* court found congressional intent to fully reimburse stevedore and to deduct attorney's fees from longshoreman's recovery in excess of benefits).

2. The same rationale as supported the *Russo* and *Spano* cases in this circuit underlay the Fourth Circuit decision in *Ballwanz v. Jarka Corp.*, 382 F.2d 433 (4th Cir. 1967); likewise, the 1972 amendments and the resolution of the conflict of interest between longshoreman and stevedore led the Fourth Circuit to hold *Ballwanz* no longer applicable. *Swift, supra,* 517

F.2d at 369-70. Despite plaintiff's assertion that this circuit "clearly adopted and, in fact, stated that it reached the same conclusion as the Fourth Circuit in *Swift,*" Plaintiff's Reply Memorandum 3, there is no hint in *Valentino* that the court of appeals "adopted" the proportional sharing theory endorsed by *Swift,* or that the case was cited by the court of appeals in this circuit for any other than the limited proposition that the 1972 amendments obviate the need to refuse counsel fees where the longshoreman's recovery is inadequate.

THE APPENDIX WHICH NORMALLY APPEARS AT THIS POINT WAS NOT REPRINTED SINCE THE PETITIONER MOVED AND WAS GRANTED THE RIGHT TO DISPENSE WITH THE PRINTING OF THE APPENDIX.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1418

WILLIAM E. BLOOMER, JR.,

Petitioner,

—against—

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DANIEL M. SEMEL

SEMEL, MCLAUGHLIN & BOECKMANN
Attorneys for Liberty Mutual Insurance Company
10 Rockefeller Plaza
New York, New York 10019
(212) PL 7-8660

TABLE OF CONTENTS

Cases Cited

Statute Cited

Other Authorities Cited

In the

Supreme Court of the United States

October Term, 1978

No. 78-1418

WILLIAM E. BLOOMER, JR.,

Petitioner,

—against—

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Question Presented for Review

Respondent concurs with the question for review as presented in petitioner's brief.

Reasons for Refusing the Writ

While there is conflict between the Circuit Courts of Appeals on this issue the decision below was correct and there is no reason for this Court to further review it. Moreover, the issue is of insufficient importance to warrant a grant of certiorari.

ARGUMENTS

POINT I

While a conflict exists between Circuit Courts of Appeals the decision below was correct and no further review of it is warranted.

As pointed out both by petitioner herein and the Court below there is a conflict between the Circuit Courts of Appeals on the issue here presented (Petition pages 9, 12A-13A).

Respondent submits that the Court below correctly determined this case. It acted to effectuate the obvious intent of Congress in passing the 1972 amendments to the Longshoremen's & Harbor Workers Compensation Act (hereinafter LHWCA) 33 U.S.C. 901 et seq. In denying petitioner's request for proportionate sharing of the attorney's fee between himself and the stevedore-employer the Court below correctly interpreted Congressional intent. In its opinion the Court below found persuasive the reasoning of the First Circuit in *Cella* v. *Partenreederei MS Ravenna,* 529 F. 2d 15 (1975) cert. denied, 425 U.S. 975, 96 S.Ct. 2175 (1976). In the aforementioned case the Court said at page 20:

> "The 1972 amendments described above were enacted as a compromise between shipowners and stevedore-employers in order to provide increased statutory compensation payments. For years the scale of compensation payments had been insufficient. Elimination of the unseaworthiness cause of action against the shipowner, and the indemnity action against the stevedore was necessary to insure adequate funds for the increased benefits. In particular the drain on the employer's resources by the attorneys' fees and expenses required to litigate the third party actions was cited as an obstacle to funding adequate compensation payments. . . . we conclude that the overriding purpose of the 1972 amendments was to strictly limit the liability of the stevedore in order to husband its resources, and its insurance carrier's resources, for the payment of the increased benefits under the Act."

The Court concluded that requiring the employer to contribute toward the attorney's fee thereby reduced the funds available to it to meet its obligation toward injured workmen. The insurance carrier for the employer was not required to pay attorneys fees out of the portion of the recovery it received.

Neither *Swift* v. *Bolten,* 517 F. 2d 368 (4th Cir. 1975), nor *Mitchell* v. *Scheepvaart Mattschappij Trans-Ocean,* 579 F. 2d 1274 (5th Cir. 1978), devote much attention to examination of the legislative intent. In *Mitchell* where the Court does devote some attention in its decision to the intent, there is some reasoning which is questionable. The *Mitchell* Court finds fault with the reasoning in *Cella* saying at page 1280: "First, the surest means of preserving workmen's compensation funds is the encouragement of proper third party suits based on negligence." There is no factual basis for such statement and it is purely ad hoc reasoning. Common sense and experience

indicate that the great majority of longshoremen's injury cases do not present opportunities for third party recovery based on negligence or any other theory. The surest means for preserving compensation funds is what Congress directed itself to in 1972, namely reduction of the stevedore-employer's liability to double recoveries.

The Court also reasons at page 1280: "A policy of assuring just compensation for attorneys who represent plaintiffs in such actions should serve as an important safeguard for the eventual reimbursement of compensation payments made to a longshoreman injured through a third party's negligence." Again, the Court's reasoning is defective: In these cases the attorney's fee is a percentage of the recovery. His fee is the same whether or not the stevedore pays a proportionate share. The only question in these cases is whether or not the injured employee will receive a greater net recovery because the employer is paying part of the cost of his attorney.

Research into the legislative history of the 1972 amendments reveals that both the Court below and the Court in *Cella* correctly interpreted the legislative intent. In H. Rep. No. 92-1441, 92d Cong., 2d Session, found in 3 U.S. Code Cong. and Admin. News, 4698, 4702-4703 it is said: "The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in a non-maritime employment ashore insofar as bringing a third party damage action is concerned and not to endow him with any special maritime theory of liability or cause of action . . ." It is clear from the foregoing that Congress sought to divorce longshoremen from the long protected special category of seamen who were subject to higher risks in their work. They were to be allowed to bring third party suits just as non-maritime workers, but were to receive higher levels of compensation in recognition of the high hazards of their

employment and in recognition of the reduced vulnerability of their employers to double payments by virtue of the amendments to the LHWCA. There is no hint of Congress' intent to give longshoremen an extra benefit in reducing the cost to them of third party recoveries by forcing their employers to share in the attorneys' fees therefore. The fact that Congress did not provide for such does not permit the Courts to read into the act an intention to do so.

At page 4706 in a section of the report entitled "Legal Fees" there is an explanation as to the intent of the Act concerning attorneys fees to be awarded against employers in formal compensation proceedings. It is provided that: "Attorneys' fees may only be awarded against the employer where the claimant succeeds, and the fees awarded are to be based on the amount by which the compensation payable is increased as a result of litigation. Attorneys' fees may not be assessed against employers (or carriers) in other cases." Here the intent to free the employer from the burden of excessive legal costs is clear. This burden is imposed only where the compensation payable is increased and is based only upon that increase. The limited extent to which Congress authorized the imposition of attorneys' fees indicates an intent to protect the employer from the imposition of such fees. If Congress had sought to impose a proportionate share of legal fees on the employer who recovers a lien it would have spelled such out in the Act.

Therefore, it is clear that the decision of the Court below which followed the *Cella* case was correct. There is no need for this Court to review it.

POINT II

Despite the fact that there is a conflict present between the Circuit Courts of Appeal the matter is not of sufficient significance to warrant this Court's review.

The number of third party actions brought by injured longshoremen has dropped dramatically since the 1972 amendments to the LHWCA. Thus, the number of longshoremen's third party actions probably has also dropped. The issue of apportionment of the attorney's fee against the lien recovery of the employer has much less economic importance than before 1972.

Moreover; this Court denied certiorari in the *Cella* case (425 U.S. 975, 96 S.Ct. 2175, 48 L. Ed. 2d 799 (1976). At the time of this denial the conflict with the Fourth Circuit case of *Swift* was already apparent, that case having been decided in 1975. Since the issue of apportionment of attorney's fees against the lien recovery was the only one with which *Cella* was concerned it must have been the subject of the petition for certiorari. If this Court felt that the conflict between the circuits at that time was not of sufficient importance to warrant a grant of certiorari the mere fact of the Second Circuit deciding to follow the path of *Cella* in the case at bar makes no stronger case for a present grant of certiorari.

Respectfully submitted,

SEMEL, MCLAUGHLIN & BOECKMANN
Attorneys for Liberty Mutual Insurance Company
10 Rockefeller Plaza
New York, New York 10019
(212) PL 7-8660

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1418

WILLIAM E. BLOOMER, JR.,

Petitioner,

-against-

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,

Respondent.

PETITIONER'S BRIEF

ALAN C. RASSNER
Counsel of Record for Petitioner
15 Park Row
New York, N.Y. 10038
(212) 227-2618

SHAFTER & SHAFTER
Attorneys for Petitioner

RASSNER, RASSNER & OLMAN
Of Counsel for Petitioner

DICK BAILEY SERVICE, INC., P.O. Box X, S.I., N.Y. 10302
Telephone: (212) 447-5358

TABLE OF CONTENTS

NOTE

Pursuant to order of this Court dated June 18, 1979, the printing of an appendix has been dispensed with.

The opinions of the Circuit and District Courts, as well as the judgment to be reviewed are printed in an appendix to the Petition for a Writ of Certiorari. References in the brief designated (A.) are to this appendix.

CASES CITED

STATUTES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1418

WILLIAM E. BLOOMER, JR.,

Petitioner,

-against-

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,

Repondent.

PETITIONER'S BRIEF

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 586 F.2d 908. The opinion of the District Court is reported at 448 F. Supp. 652.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). A petition for a writ of certiorari was granted by order of this Court dated May 14, 1979.

STATUTES WHICH THE CASE INVOLVES

33 U.S.C. §905. Exclusiveness of Liability

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Mar. 4, 1927, c. 509, §5, 44 Stat. 1426; Oct. 27, 1972, Pub. L. 92-576, §18(a), 86 Stat. 1263.

33 U.S.C. §933. Compensation for Injuries Where Third Persons are Liable

Election of Remedies

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

Acceptance of Compensation Operating as Assignment

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

Payment Into Section 944 Fund Operating as Assignment

(c) The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

Institution of Proceedings or Compromise by Assignee

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

Recoveries by Assignee

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

Institution of Proceedings by Person Entitled to Compensation

(f) If the person entitled to compensation institutes proceedings within the period described in subdivision (b) of this section the employer shall be required to pay as compensation

under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

Compromise Obtained by Person Entitled to Compensation

(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

Subrogation

(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

Right to Compensation as Exclusive Remedy

(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided,* That this provision shall not affect the liability of a person other than an officer or employee of the employer.

Mar. 4, 1927, c. 509, §33, 44 Stat. 1440; June 25, 1938, c. 568, §§12, 13, 52 Stat. 1168; Aug. 18, 1959, Pub. L. 86-171, 73 Stat. 391; Oct. 27, 1972, Pub. L. 92-576, §15(f)-(h), 86 Stat. 1262.

QUESTION PRESENTED FOR REVIEW

When a longshoreman's suit against a shipowner results in a recovery exceeding the workmen's compensation lien, does the stevedore-employer (or compensation insurance carrier) recover its entire lien from the longshoreman's recovery, or must it share proportionately in the longshoreman's costs of obtaining that recovery, including attorney's fees?

STATEMENT OF THE CASE

This action was originally brought to recover damages for personal injuries sustained by petitioner on August 9, 1973 while working as a longshoreman aboard a vessel owned and operated by C. Y. TUNG and ECKERT OVERSEAS AGENCY, INC.[1] Jurisdiction was based on diversity of citizenship (28 U.S.C. §1332). (R. 1, 11)

Petitioner was paid compensation benefits pursuant to the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §901 et seq.), by respondent, Liberty Mutual Insurance Company, the workmen's compensation insurance carrier for Connecticut Terminal Company, petitioner's employer. These benefits, including both disability payments and medical expenses, amounted to $17,152.83. (R. 19)

Counsel for petitioner and the shipowner agreed to a settlement of the action in the amount of $60,000, and while they were waiting for approval from their respective clients, Liberty

1. These parties were named as defendants in the District Court. They have no interest in the outcome of this proceeding and have not been named as parties pursuant to Rule 21 (4) of the Rules of this Court.

Mutual Insurance Company requested permission from the District Court to intervene, which was granted. (R. 19,21)

Following approval of the settlement by both the petitioner and the shipowner, the petitioner moved for summary judgment on the intervenor's action for an order directing that the lien of Liberty Mutual Insurance Company for workman's compensation benefits be fixed in an amount so that it will bear proportionately with petitioner the costs of obtaining petitioner's recovery from the shipowner, including petitioner's attorney's fees. (R. 24)

This motion was denied (A. 14)[2] and judgment was entered directing that the longshoreman's attorney's fees be awarded first from the sum recovered upon settlement with the shipowner, and that the intervenor be reimbursed in full for the compensation lien it holds (R. 32).[3]

2. Pursuant to order of this Court dated June 18, 1979, the printing of an appendix has been dispensed with.

The opinions of the Circuit and District Courts, as well as the judgment to be reviewed are printed in an appendix to the Petition for a Writ of Certiorari. References in the brief designated (A.) are to this appendix.

3. The distribution of the $60,000 pursuant to the lower Court's judgment was as follows: (R. 24)

Recovery	$60,000.00
less expenses	(202.80)
balance for distribution	$59,797.20
less fee of one-third	(19,932.40)
balance	$39,864.80
less entire lien of Liberty Mutual	(17,152.83)
net to Mr. Bloomer	$22,152.83

An appeal was taken from that part of the judgment which directed that the intervenor be reimbursed in full (R. 33). The Circuit Court affirmed (A. 1).[4]

4. Had petitioner prevailed and Liberty Mutual Insurance Company been required to share proportionately with petitioner his cost of obtaining the recovery, the $60,000 would be distributed as follows: (R. 24)

Recovery		$60,000.00
less expenses		(202.80)
balance for distribution		$59,797.20
less fee of one-third		(19,932.40)
balance		$39,864.80
entire lien of Liberty Mutual	$17,152.83	
less proportionate share of fees and expenses (.3355866 $17,152.83)*	(5,756.26)	
	$11,396.57	(11,396.57)
net to Mr. Bloomer		$28,468.23

*Expenses of litigation amounted to $202.80, and counsel fees were $19,932.40. Total cost to petitioner, therefore, of recovering $60,000 amounted to $20,135.20, or 33.55866% of the amount recovered.

ARGUMENT

WHEN A LONGSHOREMAN'S SUIT AGAINST A SHIPOWNER RESULTS IN A RECOVERY EXCEEDING THE WORKMAN'S COMPENSATION LIEN, THE LIEN HOLDER SHOULD SHARE PROPORTIONATELY IN THE LONGSHOREMAN'S COSTS OF OBTAINING THE RECOVERY, INCLUDING COUNSEL FEES.

Background

Longshoremen injured on board vessels in the course of their employment receive benefits pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq.

Pursuant to 33 U.S.C. §905(b), when the longshoreman is injured as a result of negligence of the vessel's owner, he may bring a third-party action. However, the employer of the longshoreman (or its workmens' compensation insurance carrier) has a lien on the proceeds of the recovery in the third-party action.

If the longshoreman should fail to bring the action against a responsible shipowner within six (6) months after a compensation award, the employer may bring such action (33 U.S.C. §933(b)).

Although experience has revealed that these actions are seldom, if ever, brought by stevedore employers as they hesitate to sue shipowners with whom they do business,[5] Congress has clearly set forth in 33 U.S.C. §933(e) how the proceeds of these actions should be disbursed. The statute, however, does not set forth the manner of distribution of the recovery when suit is

5. See: *Valentino v Rickners Rhederei, G.M.B.H. etc.*, 552 F.2d 466, at 469 (2nd Cir. 1977)

brought by the longshoreman himself, and the Courts have been required to fill this void.[6]

Prior to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq., when a longshoreman brought a third-party action against a vessel owner, the shipowner would almost routinely implead the stevedore (the longshoreman's employer) claiming a breach of warranty of workmanlike performance which was express or implied in the stevedoring contract. *Ryan Stevedor. Co. v. Pan-Atlantic Steam. Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956).

As a result, the longshoreman's suit against the shipowner was defended by both the shipowner and the stevedore. If the longshoreman prevailed, in many instances the shipowner would receive indemnity from the stevedore and, in effect, the longshoreman's rcovery would come from the stevedore's pocket.

The longshoreman and the stevedore, obviously, had adverse interests. This resulted in decisions such as *Russo v. Flota Mercante Grancolombiana,* 303 F. Supp. 1404 (SDNY 1969) and *Ballwanz v. Jarka Corporation of Baltimore,* 382 F.2d 433 (4th Cir. 1967), which denied any fee to the longshoreman's counsel out of the compensation lien on the basis that to do so would be to charge the stevedore with expenses and legal fees incurred by plaintiff in a law suit resulting in a judgment which the stevedore was ultimately required to pay.

6. The statute does not provide that the employer (or its compensation insurance carrier) have a lien on the proceeds of the third-party action, but all Courts who have ruled on the subject are in agreement, for equitable reasons or otherwise, that the lien exists.

The 1972 Amendments and Their Effect

With the advent of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, the employer/stevedore was no longer required to indemnify the shipowner for a judgment in favor of the longshoreman (33 U.S.C. §905 (b)).

Recognizing this change in the law, the United States Court of Appeals for the Fourth Circuit in *Swift v. Bolten,* 517 F.2d 368 (4th Cir., 1975) overruled *Ballwanz, supra,* and stated at page 370:

> "The longshoreman and the stevedore now have a common interest in the maintenance of the third-party action and both stand to gain from it. If the action is brought by the longshoreman, the stevedore can sustain no liability and it will secure a definite pecuniary advantage, if the action is successful. Provided that pecuniary advantage is secured through the services of counsel employed by the longshoreman, the stevedore should be taxed with that part of a reasonable fee for the longshoreman's counsel as is proportioned to its share of the recovery. This is the rule that has been adopted in similar instances and that accords with settled equitable principles."
>
> • • •
>
> "Accordingly, the longshoreman was entitled to have an apportionment of his attorney's fees between him and the stevedore or its insurance carrier in proportion to their share in the recovery had. After all, had the longshoreman not filed the action, the insurance carrier would have been forced to file an action to recover of the shipowner for its payments and would have incurred attorney's fees payable out of its recovery. It suffers no injury if it is forced, as we hold, to bear its proportionate share of the attorney's fees when the longshoreman files the action and makes full recovery on its behalf."

Vito Valentino, a longshoreman, recovered less in his law suit against the shipowner than he had received in compensation benefits. District Judge Jack B. Weinstein in *Valentino v. Rickners Rhederei G.M.B.H.* etc. 417 F. Supp. 176, (EDNY

1976), in a thorough opinion discussed the effect of the 1972 Amendment to the Longshoremen's and Harbor Workers' Compensation Act and various possible recoveries by longshoremen in their third-party actions, from less than the compensation lien to substantially greater than the compensation lien. He came to the conclusion that "(178) In short, the same rule of proportional sharing would apply to attorneys' fees in longshoremen's suits no matter what the recovery."

The United States Court of Appeals for the Second Circuit affirmed at 552 F.2d 466. During the course of its opinion, the Court stated at pages 468, 469:

> "The statute is silent on the distribution of the recovery in a suit brought by a longshoreman himself. We are thus required to formulate a rule that complements the statutory scheme. *See Cella v. Partenreederei MS Ravenna,* 529 F.2d 15, 20 (1st Cir. 1975), *cert. denied,* 425 U.S. 975, 96 S.Ct. 2175, 48 L.Ed.2d 799 (1976).
>
> It is a well-established principle of equity that a lawyer who creates a fund for the benefit of another is entitled to reasonable compensation for his efforts. *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939); *Chouest v. A & P Boat Rentals, Inc.,* 472 F.2d 1026 (5th Cir.) (Wisdom, J.), *cert. denied,* 412 U.S. 949, 93 S.Ct. 3012, 37 L.Ed.2d 1002 (1973)."
>
> * * *
>
> "McGrath responds that for six months after the injury, the longshoreman alone has the statutory right to sue, and the employer can do nothing. 33 U.S.C. §933(b). It argues that it could bring suit with less expensive counsel, and might pursue a different trial strategy. Neither ground supports reversal.
>
> The stevedore should not realize a windfall simply because its employee has chosen to exercise a right granted by Congress In the six-month provision of 33 U.S.C. §933(b), Congress has made a deliberate choice to allow the longshoreman alone to proceed with the suit. Thus, control of the lawsuit and choice of counsel are given to him for six molnths. The fact that he has taken up this option gives no additional rights to the employer. Moreover, if Valentino's action here did create any rights for McGrath, it would be the right to question the amount of the fee, and not to question the payment of a fee at all. Here, it is conceded that the amount of the fee is reasonable.
>
> At oral argument, both parties stated that stevedores do not, as a practical matter, pursue these lawsuits—presumably for fear of antagonizing their customers. To deny attorneys a fee in these circumstances would surely discourage counsel from pressing longshoremen's claims on a contingent fee basis in all cases, save those where a recovery subtantially in excess of the amount of the stevedore's lien is a virtual certainty. Thus, appellant asks us to sacrifice the actual rights of longshoremen and their lawyers to the theoretical possibility that they might elect to press such claims at some time in the future. We refuse to do this."

The Court, in *Valentino,* then went on to note the changes in the law wrought by the 1972 Amendments and stated at page 470:

> "With the abolition of the 'warranty of workmanlike performance' and its accompanying right to indemnity, this conflict of interest was eliminated. The Fourth Circuit, in response to this, held that *Ballwanz* was no longer applicable. *Swift v. Bolten,* 517 F.2d 368, 369-70 (4th Cir. 1975). The same rationale requires us to disapprove such cases as *Russo* and *Spano,* and reach the same conclusion as the Fourth Circuit. In doing so, we do not disturb *Fontana's* holding *on the allocation of the attorney's fee from the award.*
>
> [4] There is thus no reason to deny an attorney's fee in this case. The equitable rule of *Sprague v. Ticonic Nat'l Bank, supra,* requires it. Charging the fund with the expense of recovering it is in keeping with the statutory scheme. Finally, with the abolition of the *Ryan* action in 1972, there is no longer a conflict of interest between stevedore and longshoreman calling for a contrary result." (Emphasis supplied)

The Court cited the case of *Fontana v. Pennsylvania R.R.,* 106 F. Supp. 461 (SDNY 1952), aff'd sub nom. *Fontana v. Grace Line, Inc.,* 205 F.2d 151 (2d Cir.), cert. denied, 346 U.S. 886, 74 S.Ct. 137, 98 L.Ed. 390 (1953), which held — (1) the expense of securing the recovery from the shipowner, that is, the longshoreman's attorney's fees and costs, is the first charge against the fund itself and (2) this expense should be borne en-

tirely by the longshoreman, without any sharing by the lien holder. The reasoning was that the manner of distribution of the recovery should be the same whether the action was brought by the longshoreman or his employer (33 U.S.C. 933(e)). As indicated in the quotation noted above, the Second Circuit opinion in *Valentino, supra,* carefully affirmed only the first portion of the *Fontana* holding, i.e. ". . . on the allocation of the attorney's fee from the award." If the Court intended to affirm the *Fontana* holding in its entirety it could simply have said "In doing so we do not disturb Fontana's holding," and need not have included the italicized material.

The Decision of the Court Below

In its decision in the instant case, however, the Second Circuit followed both aspects of the *Fontana* holding, despite the fact that *Fontana* was a pre-1972 Amendment case (A.11).

The Second Circuit also based it decision partly on the case of *Cella v. Partenreederei MS Ravenna,* 529 F.2d 15 (1st Cir. 1975) cert. denied, 425 U.S. 975, 96 S.Ct. 2175 (1976), which is the leading case holding that the employer contribute nothing towards the expenses of obtaining the recovery "in order to husband its resources and its insurance carrier's resources, for payment of the increased benefits under the Act." (A.12,13).

The Equities and Analysis

To compel the longshoreman to pay the entire attorney's fee and litigation expense when a portion of the recovery inures to the benefit of the compensation lien holder is unfair and inequitable. *Sprague v. Ticonic National Bank, et al.,* 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939).

This inequity was not only recognized by the Courts which ruled in favor of proportional sharing of attorneys' fees but by the First Circuit in it decision in *Cella, supra,* wherein the Court stated at page 20:

> "Were we to follow the fourth circuit and hold that the normal dictates of equity control the allocation of attorney's fees in this case, we might be more disposed to find that it would be appropriate to award fees out of that portion of the settlement that goes to reimburse Cella's employer."

The Court, however, concluded that the "normal dictates of equity" did not control. The opinion continued at pages 20, 21:

> "But this case arises in the context of the Longshoremen's and Harbor Workers' Compensation Act."
>
> * * *
>
> "The 1972 amendments described above were enacted as a compromise between shipowners and stevedore-employers in order to provide increased statutory compensation payments. For years the scale of compensation payments had been insufficient. Elimination of the unseaworthiness cause of action against the shipowner, and the indemnity action against the stevedore was necessary to ensure adequate funds for the increased benefits. In particular, the drain on the employer's resources by the attorney's fees and expenses required to litigate the third party indemnity actions was cited as an obstacle to funding adequate compensation payments. H.Rep. No. 92-1441, 92d Cong., 2d Sess. in 3 U.S. Code Cong. & Admin. News, pp. 4698, 4702 (1972) S. Rep. No. 92-1125, 92d Cong. 2d Sess. 9 (1972). We conclude that the overriding purpose of the 1972 amendments was to strictly limit the liability of the stevedore in order to husband its resources, and its insurance carrier's resources, for payment of the increased benefits under the Act.
>
> [3-5] An award of attorney's fees out of that portion of a third party tort settlement which goes to reimburse the employer or its carrier would contravene this fundamental purpose. It would cause a reduction in the amounts which the employer can legitimately call upon to fund its obligation towards injured workmen under the Act."

Prior to the 1972 Amendments it no doubt cost the stevedores money in attorneys fees to litigate indemnity actions, but this was the proverbial "drop in the bucket" compared to the amounts they were paying in judgments and settlements in these actions. The stevedore was required not only to reimburse

the shipowner for the amount it was required to pay the longshoreman, but the shipowner's legal fees and expenses as well. *Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc.*, 339 F.2d 673 (3rd Cir. 1964), cert. denied 382 U.S. 812, 86 S.Ct. 23, 15 L.Ed. 2d 60. It was the elimination of the entire indemnity action, of which the stevedore's own litigation costs and attorney's fees were a small part, which was the trade-off for increased compensation payments.

The basis for the *Cella* holding was carefully analyzed and found "incomplete" by the United States Court of Appeals for the Fifth Circuit in the case of *Mitchell v. Scheepvaart Maatschappij Trans-Ocean,* 579 F.2d 1274 (5th Cir. 1978). The Court there stated at pages 1280, 1281:

> "[4] We think this analysis incomplete in at least three respects. First, the surest means of preserving workmen's compensation funds is the encouragement of proper third-party suits based on negligence. A policy of assuring just compensation for attorneys who represent plaintiffs in such actions should serve as an important safeguard for the eventual reimbursement of compensation payments made to a longshoreman injured through a third-party's negligence. See *Brown v. American Mail Line, Ltd., supra.*
>
> [5] Second, although the maintenance of adequate benefits is one of the Act's chief concerns, the "overriding purpose" of the LHWCA is the effective protection of injured employees. With respect to employees injured by third-party negligence, that purpose was furthered in 1959 by the elimination of the election of remedies requirement under 33 U.S.C. §933(a). Act of August 18, 1959, P.L. 86-171. That purpose will similarly be furthered by assuring plaintiffs' attorneys just compensation, while protecting the plaintiffs themselves from undue expense in pursuing their damages remedy.
>
> Finally, the formula adopted for the distribution of employers' recoveries in suits under Section 33(e) emphasizes the critical importance, even in employers' suits, of protecting employees' rights in cases of negligence. Section 33(e)(2) permits the employer to retain one-fifth of its net recovery after

> subtracting those expenses permitted under Section 33(e)(1). Although the formula is not explained in the legislative history of the original statute, of which this provision is a part, the Senate Committee on Labor and Public Welfare, in reporting on the 1959 amendments to the Act, said:
>
> > . . . by giving the employer a reasonable (one-fifth) share in the net recovery an incentive is provided not to compromise a suit only for the amount of compensation but to protect the interest of the employee as much as possible.
>
> S.Rep.No. 428, 86th Cong., 1st Sess., *reprinted in* [1959] U.S. Code Cong. & Admin. News, pp. 2134,2135. Implicit in this interpretation are the twin goals of employee protection through the preservation of compensation funds and employee protection through appropriate recoveries from tortfeasors. Our holding that employers or their carriers may be required to contribute to a reasonable attorney's fee represents a proper balancing of these two kinds of employee protection."

See also, *Brown v. American Mail Line, Ltd.*, 437 F.Supp. 628, which ruled in favor of proportional sharing of attorney's fees and criticized the holding in *Cella, supra.*

The Second Circuit also relied for its decision in the instant case on the argument made in *Fontana, supra,* that pursuant to 33 U.S.C. §933 (d) and (e) when the action is brought by the employer against the shipowner and a recovery is made, the employer retains from the proceeds of the recovery the expenses incurred in bringing the action against the shipowner, including attorney's fees and the full amount of the lien and that, similarly, the employer should receive the full amount of the lien without deduction of attorney's fees when the employee brings the action (A.11, 12). The circumstances, however, are as a practical matter, not the same.

If the employer brings the action, he must pay an attorney and risk the loss of the attorney's fee if the case is lost or the recovery small. He subjects himself to discovery proceedings and all of the other inconveniences which must be suffered by an active litigant. He may become liable to a judgment for costs. If the employer assumes these liabilities and responsibilities, he is entitled to the benefits of the statutory distribution set forth at 33 U.S.C. §933(e).

When the longshoreman brings the action, however, the employer gets a completely free ride. He is not a litigant, incurs no costs or liability for indemnity (33 U.S.C. §905) and, pursuant to the decision of the Court of Appeals, stands to recoup the full lien at the complete expense of the longshoreman.

The holding by the Fifth Circuit in the *Mitchell* case, *supra,* that a determination be made on an individual case basis by the District Judge as to whether or not the employer should share in the costs of obtaining the recovery is certainly more equitable than a complete denial of any sharing.

It is respectfully suggested, however, that except in those circumstances where the attorney for the employer participates in the litigation along with the attorney for the longshoreman and contributes legal services which aid in achieving the recovery, or the longshoreman's attorney charges a fee in excess of the fees customarily charged, a hearing in each case is burdensome and unnecessary.

The compensation lien is not a debt owed by the longshoreman to the stevedore. The only person owing the debt to the employer is the shipowner whose negligence caused the longshoreman's accident and thus caused the employer to make compensation payments. Therefore, when the longshoreman obtains counsel and secures payment of the debt for the employer, the employer should bear the expenses of his own recovery. Whether the total recovery from the shipowner is greater or less than the lien or large or small is immaterial. *Sprague v. Ticonic National Bank et al., supra.*

CONCLUSION

The judgment of the Circuit Court should be reversed with instructions to the circuit court to direct that plaintiff's motion for summary judgment on the intervenor's action be granted, and an order entered directing that the lien of liberty Mutual Insurance Company for workmen's compensation benefits be fixed in an amount so that it will bear proportionately with petitioner the costs of obtaining petitioner's recovery from the shipowner, including petitioner's attorney's fees.

Respectfully submitted,

ALAN C. RASSNER
15 Park Row
New York, N.Y. 10038
(212) 227-2618
Counsel of Record for Petitioner

SHAFTER & SHAFTER
Attorneys for Petitioner

RASSNER, RASSNER & OLMAN
Of Counsel for Petitioner

APPENDIX

RELEVANT DOCKET ENTRIES

March 28, 1974	Filed complaint and issued summons.
June 14, 1974	Filed Defendant's answer.
July 21, 1977	Filed [motion by] Liberty Mutual to intervene as a plaintiff and affidavit in support of, returnable 8/3/77, 10:00 AM, Room 1904.
August 9, 1977	Filed affidavit of A. Rassner by plaintiff re: in connection with the motion by Liberty granting leave to intervene.
August 17, 1977	Filed memo endorsed on entry docketed 7/21/77; re: motion (to intervene) granted. TENNEY J. m/n.
September 28, 1977	Filed Notice of Motion by plaintiff re: an order pursuant to FRCP 56 that Liberty's lien be paid to plaintiff, returnable 10/11/77.
March 28, 1978	Filed MEMORANDUM No. 47026 — Summary Judgment is denied to the plaintiff, and award instead to the intervenor Liberty Mutual Ins. Co. as subrogee of the stevedore Connecticut Terminal Co. Attorney's fees to be awarded first from the sum recovered by plaintiff, upon settlement with the defendant, and the intervenor is to be reimbursed in full for the compensation

lien it holds pursuant to 33 USC Sec. 933 (h). Settle Judgment on Notice. So Ordered: Tenney, J. mn/.

April 14, 1978 — Filed JUDGMENT WITH NOTICE OF SETTLEMENT — that summary judgment be denied to the plaintiff and awarded to the intervenor Liberty Mutual and that attorney's fees are to be awarded first from the sum recovered by plaintiff upon settlement with the defendant and the intervenor is to be reimbursed in full for the compensation lien it holds pur. to 33 U.S.C. Sec. 933 (h). So Ordered. Tenney, J. JUDGMENT ENTERED: CLERK m/n

April 28, 1978 — Filed plaintiff's Notice of Appeal from that portion of the judgment which denied plaintiff's motion for summary judgment, etc. and grants summary judgment to the intervenor Liberty, that intervenor be reimbursed in full for the compensation lien it holds. Copies mailed to: Semel, McLaughlin & Boeckmann, & Kirlin, Campbell & Keating.

January 29, 1979 — Filed true copy of mandate of USCA—the order of said District Court is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant. A. Daniel Fusaro, Clerk. Judgment entered 01/29/79. Raymond F. Burghardt, Clerk. No bill of costs or statement attached.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1418

WILLIAM E. BLOOMER, JR.,

Petitioner,

—against—

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,

Respondent.

RESPONDENT'S BRIEF

DOUGLAS A. BOECKMANN
Attorney for Liberty Mutual Insurance Company
10 Rockefeller Plaza
New York, New York 10019
(212) PL 7-8660

TABLE OF CONTENTS

Cases Cited

Statute Cited

Other Authority Cited

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1418

WILLIAM E. BLOOMER, JR.,

Petitioner,

—against—

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,

Respondent.

RESPONDENT'S BRIEF

Question Presented for Review

Respondent agrees with the statement of the issue presented as set forth on page 6 of petitioner's Brief.

Statement of the Case

Respondent Liberty Mutual likewise is in agreement with the statement of the case as set forth on pages 6-8 of the petitioner's Brief and proposes no counterstatement.

ARGUMENT

The Court below properly construed Congressional intent in disallowing an attorney's fee.

That the district court and the Court of Appeals for the Second Circuit correctly interpreted Congressional intent can be seen by looking at the history of the LHWCA, the legislative history of the 1972 amendments, the provisions of the Act itself and recent decisions construing it.

A. History

Following the enactment of the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901 et seq. (hereinafter, "Act") in 1927 the employer-stevedore's liability for work related injuries was limited to the compensation provided for by the Act. However the longshoremen's remedies against third parties were preserved. A longshoreman could receive compensation and recover damages if successful in an action against the ship owner, 33 U.S.C. 933 (amended 1972). In order to prevent a double recovery in such a situation, the Courts imposed a lien in favor of the employer on the longshoremen's tort recovery up to the amount of the compensation payments. *The Etna,* 138 F. 2d 37 (3rd Cir. 1943); *Fontana* v. *Pennsylvania Railroad,* 106 F. Supp. 461, aff'd.

sub nom *Fontana* v. *Grace Line, Inc.,* 205 F. 2d 151 (2d Cir.) cert. den. 346 U.S. 886 (1953).

In 1946 in *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, this Court held that a longshoreman is engaged in traditional seaman's work and therefore entitled to the benefit of the ship owner's warranty of seaworthiness. Because of the absolute nature of this imposed liability for longshoremen's injuries, ship owners attempted to shift the burden of liability by seeking complete indemnity from the stevedore whenever the injured employee's injuries were caused by a breach of the stevedore's warranty of workmanlike performance. Finding that this warranty was the "essence" of the stevedoring contract this approach was upheld in *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.,* 350 U.S. 124 (1956). This indemnity action was not barred, said the *Ryan* Court, by the exclusive liability section of LHWCA since such an action was predicated solely upon a duty running from the stevedore to the ship owner. Thus the courts were besieged with longshoremen's personal injury suits and the stevedore often would be held liable for the total amount of damages. It became necessary for Congress to make an adjustment because the judicially imposed no fault liability did not offer the compensating factors available in a legislatively established workmen's compensation system.

B. Legislative history of the 1972 amendments.

When it enacted the 1972 amendments Congress repudiated the application of a no fault standard of recovery except against the stevedore.

Both the Senate and House Committee reports demonstrate that the overriding concern in enacting the 1972

amendments was the fashioning of an effective workmen's compensation scheme which would not only provide injured workers with adequate compensation, but would diminish the number of third party actions and thereby provide resources to help finance the increased compensation benefits. The Senate Committee Report states:

> "The Committee heard testimony that the number of third party actions brought under the *Sieracki* and *Ryan* line of decisions had increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs. S. Rep. No. 1125, 92d Cong., 2d Sess. 9 (1972), reprinted in (1972) U.S. Code Cong. and Admin. News 4703.

The same report also noted that such third party litigation had an impact on the backlog of personal injury cases in federal district courts.

Accordingly the committee felt that given the vast increase in compensation benefits which the amendments provided there was no longer any reason to require ship owners to assume what amounted to absolute liability for injuries to workers covered by the Act while working on their vessels. There were political considerations which prevented the inclusion of ship owners under the umbrella of immunity from tort liability provided to stevedore employers. However, despite the fact that ship owners were still to be liable to suits brought by injured longshoremen, the grounds for recovery would be limited to their own negligence.

The Senate Committee report also emphasizes the costs of pre 1972 litigation and the effect on benefits:

> "The social costs of these lawsuits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in the actual benefits for injured workers.
>
> For a number of years representatives of the employees have attempted to have the benefit levels under the Act raised so that the injured workers would be properly protected by the Act. At the same time employer groups indicated they could do so only if the Longshoremen's and Harbor Worker's Compensation Act were to again become the exclusive remedy against the stevedore as it has been intended since its passage in 1927 until modified by various Supreme Court decisions.
>
> The bill reported by the Committee meets these objections by specifically eliminating suits against vessels brought for injuries to longshoremen under doctrine of seaworthiness and outlawing indemnification actions and 'hold harmless' or indemnity agreements. It continues to allow suits against vessels or other third parties for negligence. At the same time it raises benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act." S. Rep. No. 92-1125, 92d Congress, 2d Sess. 4-5 (1972).

C. The provisions of the Act

Surveying provisions of the amended Act as well the legislative history above, it is apparent that the intent of Congress was to create strictly a worker's compensation scheme in place of all other liability for the stevedore employer. Congress intended to keep the stevedore out of court.

First, the benefit levels are high. In 33 U.S.C. 906 (b) (1) the maximum benefit level is 200% of the national average weekly wage. This determination of the average wage is made annually and was obviously intended to keep benefit levels current with inflation. Few compensation statutes are so indexed for inflation. Therefore by setting such high levels and keeping them current Congress obviously intended that such payments should be, in the overwhelming majority of cases, the only source of compensation for an injured longshoreman. Aware that such high benefit levels would be expensive to fund Congress sought to relieve the employers from any other expenses. If this Court reverses the Second Circuit there will obviously be additional expenses incurred by the employer since it will not be able to recoup its entire lien in the event of a third party recovery but have to share it with the longshoreman's attorney.

That it was Congress' intent to have the stevedore recover its full lien in all cases is clearly shown by the formula set out in 33 U.S.C. 933 (e). There, if the employer by action of its own recovers against a liable third person it is entitled to retain not only its expenses and a reasonable attorney's fee, the cost of all benefits and compensation paid or payable, it is entitled to one fifth of any excess over such amounts, the remainder going to the injured employee. While Congress may not have been aware that it was not the normal business practice of stevedore employers to bring such claims against their customers, Congress' intent to provide a system of full recoupment for employers cannot be more plain. The same result should obtain if the employee brings the suit.

Petitioner (Brief page 17) makes the point that the employer gets a free ride if the longshoreman brings the suit and is not required to contribute to the attorney's

fee, since the employer would have to risk the possible loss of an attorney's fee if it brought an unsuccessful action. However, there is no reason why an employer could not hire an attorney on a contingent fee basis and pay no fee if there is no recovery just as the employee can. Moreover, the employer does not get a "free ride". If the employee's suit is successful the employer is recouping only what the Act mandates that it is required to pay an injured longshoreman. These benefits are high and designed to provide close to full wage replacement as well as attendant medical and rehabilitation benefits. If the employee as a result of a third party action recovers additional monies that is all to his good, but it should not be at the expense of his employer who is mandated to pay benefits without regard to fault. Perhaps something indeed is taken away from the overall amount of money which that particular injured longshoreman will receive as the result of his injury, but requiring the stevedore employer to make an additional contribution by way of reduction of its lien only serves to penalize the entire body of employees, to enrich one employee, and to reduce the employer's resources for the payments of possible benefits to its other employees.

Moreover, if the attorney is to be awarded a portion of the lien recoupment it would have to be done in a Court proceeding. This would be inconsistent with the purposes of the Act in two respects. It would drag the stevedore employer needlessly into Court in an effort to contest the amount of the attorney's fee and keep it at a minimum. It would also be inconsistent with 33 U.S.C. 933 (e) which requires that the Deputy Commissioner approve the amount of the attorney's fee in employer initiated actions. That provision seems to indicate an intent by Congress to oversee the amount paid by the employer in attorneys' fees and do it within the context of the compensation

scheme. If a judge is to set the amount of the fee in an employee initiated suit the Deputy Commissioner has no control over that fee and cannot exercise a control of its reasonableness nor will he be able to provide uniformity throughout the country.

Congress' intent that the compensation scheme operate without the burden of attorneys and their fees is shown in the four subsections of 33 U.S.C. 928. Subsection (a) provides for an award of a reasonable attorney's fee if the employer contests the claim, the claimant *thereafter* utilizes the services of an attorney and then is successful in receiving an award of compensation (Emphasis added).

Subsection (b) provides that if the employer tenders payment of compensation without an award and then a controversy develops over the amount of additional compensation claimed the Deputy Commissioner is required to hold a conference and make a recommendation as to the additional compensation if any to which the employee is entitled. If the employee refuses this recommendation, *thereafter* hires an attorney and receives an award greater than the amount tendered, a reasonable attorney's fee based upon the difference is to be awarded (Emphasis added).

Subsection (c) provides for approval in all cases of fees of attorneys representing a claimant.

Subsection D provides that in cases were an attorney's fee is awarded against an employer the employer may also be assessed other costs attendant upon the holding of a hearing at the instance of the claimant.

Congress' specific treatment of attorneys' fees in the foregoing instances indicates clearly its desire to have these elements in the compensation scheme under strict control. They are to be awarded only in limited instances

and are subject to approval. The statutory scheme appears to indicate that attorneys should not be necessary except in the event of a controversy, and even then, only in the event that claimant is successful. The intent is obviously to protect the employers' resources except in those instances where the end result proves that the employee was correct in pressing his claim over a contest.

Amicus, The Association of Trial Lawyers of America, argues (Brief pp. 20-21) that since this is one of the few statutes of its kind allowing fees to be paid at the carriers' expense that it is meant to encourage good lawyers to spend the necessary time and effort to secure a claimant's rights. To the contrary, the statute seems to be designed to discourage participation of lawyers and encourage the voluntary payment of compensation without contests. The Statute does not contain, an inducement for the lawyers to take third party actions. It is neutral on this point. What is clear is that the attorneys' fees which under pre-amendment law became an uncontrollable expense to the employer, are now intended to be kept under strict control and scrutiny in order to preserve the employer's assets for the voluntary payment of the high benefit levels.

D. Recent Supreme Court decisions are in accord with respondent's position.

In addition to the legislative history and the provisions of the statute itself, recent decisions by this Court are in line with the position advocated by respondent. For example in *Edmonds* v. *Compagnie Generale Transatlantique,* —— U.S. ——, 61 L Ed 2d 521 a federal district court jury had determined that a longshoreman in his suit against the ship owner had suffered total damages

of $100,000., that he was responsible for 10% of the total negligence, that the ship owner was responsible for 20% and that the stevedore's fault through a co-employee's negligence was 70%. The District Court reduced the award to the longshoreman by the 10% attributable to his own negligence but refused to further reduce the award against the ship owner in proportion to the fault of the stevedore-employer. In the 4th Circuit Court of Appeals there was a reversal on the ground that the 1972 amendments had altered the traditional admiralty rule by making the ship owner liable only for that share of the total damages equivalent to the ratio of its fault to the total fault. In reversing the 4th Circuit this Court recognized that it was dealing with a combination of statutory and judge made law. It found that in 1972 Congress aligned the rights and liabilities of stevedores, ship owners, and longshoremen in light of the rules of maritime law that it chose not to change. The majority of this court felt that the Congress was well aware of the pre-existing judicially created rule that the ship owner was responsible for all the damages not due to the plaintiff's own negligence. It said:

> "By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases advise, we should stay our hand in these circumstances." (61 L Ed 2d 521, 535).

So too here the court should not upset pre-existing judge-made principle of maritime law that the employer should have the first claim, after attorneys' fees and expenses, for recoupment of its lien and that it should not have that lien subject to any reduction for litigation expenses. *Ballwanz* v. *Jarka Corp.,* 382 F. 2d 433 (4th Cir. 1976); *Ashcraft & Gerel* v. *Liberty Mutual Insurance Company,* 343 F. 2d 333 (D. C. Cir. 1965); *Haynes* v. *Rederi A/S Alladdin,* 362 F. 2d 345 (5th Cir. 1966). It must be presumed that Congress was well aware of these cases when it passed the 1972 amendments since they were all decided after the 1959 amendment, 33 U.S.C. 933, which permitted the injured longshoremen to maintain an action in his own name after acceptance of compensation benefits. Congress also added at that time the allocation formula for distribution of any recovery made by the employer in 933 (e). If Congress was dissatisfied with the judge made rule which developed in the ensuing 13 years, giving the employer complete recoupment of its lien where there was a sufficient recovery, it could have made changes in 1972. It did not do so. This court in *Edmonds* decided that it should "stay its hand" in areas that Congress did not see fit to change, and the same reasoning should apply here. As this court has said:

> "Once Congress has relied upon conditions that Courts have created, we are not as free as we would otherwise be to change them. A change in the conditions would effectively alter the statute by causing it to reach different results then Congress envisioned." (61 L Ed 2d 521, 535).

In *Director, Office of Workers' Compensation Programs* v. *Rasmussen,* —— U.S. ——, 59 L Ed 2d 122 this court was required once again to look into the legislative history of the 1972 amendments to determine Congress' intent in establishing a completely new formula for determining disability benefits, yet leaving unchanged the formula for determining death benefits. It was argued that the omission of a maximum limitation on death benefits such as that placed on disability benefits was inadvertent.

This Court was urged to read into the Act a maximum on death benefits in order to avoid discriminatory consequences. In the unanimous opinion however, this Court felt that the omission of Congress was intentional and it was not permissible to rewrite Congress' words (59 L Ed 2d 122, 135).

In the case at bar, petitioner would have this Court rewrite the legislation in a situation where Congress relied upon the state of the law as it existed when the 1972 legislative corrections were made. As it has in the two cases cited above the Court should once again stay its hand.

One other circuit has taken the position of the court below and that advocated by respondent. In *Cella* v. *Partenreederei MS Ravenna,* 529 F2d 15 (1st Cir. 1975) the court concluded that the Congressional intent was to "strictly limit the liability of the stevedore in order to husband its resources and its insurance carriers resources for payment of increased benefits . . . Awarding an attorney a fee out of that portion of a third party tort settlement which goes to reimburse the employer would contravene that purpose. It would cause a reduction in the amount which the employer can legitimately call upon to find its obligation toward injured workmen . . . We conclude, in accordance with the intent of Congress, that reimbursement funds undiminished by attorneys' fees should be available to fund the compensation of workmen whose injuries cannot be charged to the tortious conduct of third parties" (529 F2d at 20-21).

Neither *Swift* v. *Bolten,* 517 F. 2d 368 (4th Cir. 1975), nor *Mitchell* v. *Scheepvaart Mattschappij Trans-Ocean,* 579 F. 2d 1274 (5th Cir. 1978), devote much attention to examination of the legislative intent. In *Mitchell* where

the Court does devote some attention in its decision to the intent, there is some reasoning which is questionable. The *Mitchell* Court finds fault with the reasoning in *Cella* saying at page 1280: "First, the surest means of preserving workmen's compensation funds is the encouragement of proper third party suits based on negligence." There is no factual basis for such statement and it is purely ad hoc reasoning. Common sense and experience indicate that the great majority of longshoremen's injury cases do not present opportunities for third party recovery based on negligence or any other theory. The surest means for preserving compensation funds is what Congress directed itself to in 1972, namely reduction of the stevedore-employer's liability to double recoveries.

The Court also reasons at page 1280: "A policy of assuring just compensation for attorneys who represent plaintiffs in such actions should serve as an important safeguard for the evntual reimbursement of compensation payments made to a longshoreman injured through a third party's negligence." Again, the Court's reasoning is questionable. Whether or not third party actions are brought or not will be based as always on a variety of factors; the severity of the injury, an estimate of the degree of liability of the prospective defendant, and an estimate of the possible net recovery over expenses. A holding by this court allowing the employer complete recoupment will as amicus Master Contracting Stevedore Assocition argues (brief pp. 12-14) discourage marginal litigation by increasing the expense factor and reducing the net recovery. This will not be a great loss to injured longshoremen, because it will be mainly the smaller cases that fall by the wayside. The larger case where the injury is more severe and the potential recovery greater will continue to be pursued.

Adoption of the position taken by respondent will, of course, not preclude the courts from fashioning allocations where the third party recovery is insufficient to pay expenses, including the plaintiff's attorney's fee and the employer's full lien such as in *Valentino* v. *Rickners Rederi G.M.B.H., SS Etha,* 552 F2d 466 (2nd Cir. 1977). It is quite possible the Congress in 1972, while clearly indicating its intent that the employer's resources be protected against claims for attorney's fees, made no provision for lien recovery in longshoremen initiated suits because it did not want to tie the hands of courts in such instances.

Perhaps in such cases a hearing might be held or affidavits submitted to the court by interested parties to aid the court in making the proper allocation. Where the recovery is sufficient to satisfy expenses and the employer's lien intervention by the court, which *Mitchell* says should be done in each case, is unnecessary. The employer should not have to argue for its lien recovery and it should be kept out of court in consonance with Congressional policy.

CONCLUSION

The judgment of the Court of Appeals for the Second Circuit should be affirmed in all respects.

Respectfully submitted,

DOUGLAS A. BOECKMANN
SEMEL, MCLAUGHLIN & BOECKMANN
Attorney for Liberty Mutual Insurance Company
10 Rockefeller Plaza
New York, New York 10019
(212) PL 7-8660

IN THE
Supreme Court of the United States
October Term, 1978

NO. 78-1418

WILLIAM E. BLOOMER, JR.,
Petitioner,

-against-

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,
Respondent.

Petitioner's Reply Brief

ALAN C. RASSNER
15 Park Row
New York, N.Y. 10038
(212) 227-2618
Counsel of Record for Petitioner

SHAFTER & SHAFTER
Attorneys for Petitioner

RASSNER, RASSNER & OLMAN
Of Counsel for Petitioner

DICK BAILEY SERVICE, INC., P.O. Box X, S.I.,N.Y. 10302
Telephone: (212) 447-5358

TABLE OF CONTENTS

CITATIONS

Cases:

Statutes:

Other Authorities:

PETITIONER'S REPLY BRIEF

POINT I

THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, 33 U.S.C. §901 ET SEQ., WERE NOT ENACTED IN RELIANCE ON THE FULL RECOUPMENT OF THE STEVEDORES' LIEN

Respondent cites *Edmonds v. Compagnie Generale Transatlantique,* ____U.S.____, 99 S. Ct. 2753, 61 L. Ed. 2d 521, for the proposition that "Once Congress has relied upon conditions that Courts have created, we are not as free as we would otherwise be to change them. A change in the conditions would effectively alter the statute by causing it to reach different results than Congress envisioned." (61 L.Ed.2d 521, 535).

Respondent also cites *Director, Office of Workers' Compensation Programs v. Rasmussen,* ____U.S.____, 59 L.Ed.2d 122, urging that an answer to the question presented in petitioner's favor " * * * would have this Court rewrite the legislation * * * ".

In the case at bar, however, Congress did not rely on the stevedores' recoupment of their entire lien when it amended the Longshoremen's and Harbor Workers' Compensation Act in 1972. In fact, there is nothing, eitner in the legisiative history or elsewhere, to show that Congress gave any consideration to the question presented whatsoever prior to the Amendment's passage. In any event the law applicable prior to 1972 was not uniform. (Compare *Ballwanz v. Jarka Corp.,* 382 F.2d 433 (4th Cir. 1967) with *Strachan Shipping Co. v. Melvin,* 327 F.2d 83 (5th Cir. 1964) and *Haynes v. Rederi A/S Aladdin,* 362 F.2d 345 (5th Cir. 1966), cert. denied, 1967, 385 U.S. 1020, 87 S. Ct. 731, 17 L. Ed. 2d 557).

As stated by Mr. Justice Blackwell in his dissenting opinion in the *Edmonds* case:

> "Congress had two narrow objectives in mind in enacting §905(b) in 1972; to overcome this Court's decision in Seas Shipping Co. v. Sieracki, 328 U.S. 25 (1946), and its decision in Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124 (1956). See S. Rep. No. 1125, 92d Cong., 2d Sess., 8-11 (1972)."

It was only when the amendments were in effect, and the Courts were faced with the problem of disbursing recoveries by longshoremen in third-party actions, that the inequity of allowing the stevedore to recoup its lien in full, in view of the changes wrought by the amendments, became apparent. *Swift v. Bolten,* 517 F.2d 368 (4th Cir. 1975)

POINT II

A COURT HEARING IN EACH CASE WOULD BE BURDENSOME AND UNNECESSARY.

In the case of *Bachtel v. Mammoth Bulk Carriers, Ltd.,* ____F. 2d____, decided August 20, 1979, the United States Court of Appeals for the Ninth Circuit came out strongly in favor of proportional sharing of attorney's fees and expenses.

On page 17 of the slip opinion, the Court stated:

> "After further analysis, *Mitchell* went on to recognize that while the pro-rata approach stated in *Swift* might be appropriate in many cases, it would not adopt it as a hard and fast rule. It suggested in some cases the recovery might be large enough so that the entire attorney fee should be paid by the injured person. The *Mitchell* court concluded by suggesting a "balancing" approach which would consider the reasonableness of the fees, the services rendered, and the equities involved.
>
> The Ninth Circuit has not spoken upon the problem. Upon reflection we forecast nothing but trouble and confusion in attempting to apply the *Mitchell* "balancing" formula. The guidelines are so vague that an appeal could be expected in a substantial number of the cases. The "Fund" approach stated in *Cella, Fontana,* and *Valentino* is unfair and in many instances would work a devastating hardship on the injured person. The *Swift* "pro-rata" formula is easy to apply and is completely in line with equitable principles as well as Congress' intent in adopting the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. On this record, we adopt the *Swift* "pro-rata" rule as the law to be applied in the Ninth Circuit."

The fact that Congress in 33 U.S.C. §933(e) (employer initiated action) and in 33 U.S.C. §928 (contested compensation proceedings) required approval of attorney's fees does not evidence an intent by Congress that a Court hearing be required for approval of attorney's fees in third-party actions commenced by longshoremen.

These actions have been brought for many years without such hearings.

In some jurisdictions, the percentage amount of contingent fees is set by Court rule,[1] and in others, by custom.

These amounts are well known to stevedores and their attorneys. Unless the attorney for the longshoreman is charging a fee in excess of that customarily charged, or the attorney for the stevedore participated in the litigation, there is no need for any Court proceeding. A simple proportional sharing of the fees and expenses of litigation between the lienholder and the longshoreman is all that is required. *Swift v. Bolten,* 517 F.2d 368 (4th Cir. 1975); *Brown v. American Mail Line, Ltd.,* 437 F.Supp. 628 (DC Oregon 1977).

---

1. Rule 603.7 of the Rules of the New York Supreme Court, Appellate Division, First Department, specifies the percentage amount that an attorney may charge as a contingent fee in a personal injury or wrongful death action. The Rule also states that the charging of an amount equal to or less than the schedule of fees set forth " * * * is deemed to be fair and reasonable." There are similar Rules in the other three Judicial Departments in New York State.

POINT III

THE DIRE CONSEQUENCES OF A DECISION IN PETITIONER'S FAVOR PREDICTED BY AMICUS, MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC., WILL NOT MATERIALIZE.

(a) Contrary to amicus' contention, the question presented by petitioner applies to all recoveries by longshoremen, whether by judgment or settlement with or without the stevedore's consent.

If the case at bar had gone to trial and Mr. Bloomer had recovered a judgment of $60,000, Mr. Bloomer would still contend that Liberty Mutual Insurance Company should share proportionately with him the costs of effecting the recovery and the question presented would still be before this Court. The same would be true had Liberty Mutual Insurance Company consented to the settlement.

Considering, however, that the stevedore is no longer exposed to a judgment for indemnity (33 U.S.C. §905(b)) and that pursuant to the Second Circuit's decision in the instant case, the stevedore will recoup its entire lien from the longshoreman's recovery, written approval of the stevedore to settlement of a longshoreman's third-party action or, in fact, any sort of compromise by the stevedore concerning its lien, is difficult if not impossible to obtain. This is illustrated by the position taken by respondent prior to the settlement of the instant case in the District Court (R. 21).

(b) Proportional sharing of fees and expenses by those parties benefiting from the recovery will not provide an incentive for marginal third-party actions or for "quick money" settlements.

Petitioner does not want to enter into a philosophical or moral discussion of whether or not marginal litigation deserves consideration by the Court. Petitioner does suggest, however, that the decision by the Court in the instant case will have no effect upon the volume of litigation whatsoever.

If the longshoreman presents a situation wherein there is a reasonable chance of establishing the negligence of the shipowner and has an injury serious enough to support a recovery sufficiently large so that an attorney can earn a reasonable fee, an attorney will take the case. The fee will be the same whether there is proportional sharing of the fee by the lienholder or not (see footnotes 3 and 4 of petitioner's main brief, pages 7 and 8).

The fact that the attorney's fee remains the same, no matter what the outcome of the case, also disputes amicus' argument that a ruling in favor of petitioner would encourage "quick money" settlements.

The proposed question presented by amicus on page 8 of its brief also ignores this fact.

The suggestion by amicus on page 10 of its brief that the stevedore's lien should be the first charge against the recovery has no legal support, is outside the scope of the question presented, and, as no appeal was taken from that part of the judgment fixing the attorney's fees (R. 33), was not considered by the Circuit Court (A. 8). In any event, the suggestion would result in inequities. For example, if the recovery in the instant case remained at $60,000, but the lien were $50,000, pursuant to amicus' suggestion, the stevedore would recover its full $50,000 lien at no cost to it, and the attorney through whose effort this recovery was made would receive a fee of $3,333.00 paid by the longshoreman.

The suggestion by amicus on page 11 that a net recovery of $33,000 would have been sufficient to settle Mr. Bloomer's third-party action had there been no lien is unrealistic.

The measure of a settlement in any third-party action is what the parties and their attorneys are willing to agree upon in order to avoid the risk that they will do worse at the hands of a jury.

Even if there were no lien, Mr. Bloomer's case would still have been settled for $60,000 as a potential jury verdict could not be affected by the lien, one way or the other.

(c) Reversal of the Second Circuit's decision will not result in employers withholding compensation benefits.

Amicus suggests that employers, knowing that they will recoup only approximately two-thirds of their lien rather than the full lien upon the longshoreman's third-party action, will be reluctant to make compensation payments (p. 16 of amicus brief).

Carrying this suggestion one step further, the employer should be even more reluctant to make payments voluntarily when no third-party action at all is possible and there is no chance of recoupment.

As amicus correctly notes, since the 1972 Amendments eliminating recovery based on unseaworthiness, "the frequency of litigation has declined" and, obviously, the number of cases in which liens are recouped has declined.

With all due respect to amicus, it is unrealistic to presume that the few longshoremen who have third-party actions will be discriminated against because the compensation carrier will stand to only recover approximately two-thirds rather than the full amount of their compensation payments when, in the vast

majority of cases, no recoupment of compensation payments at all will be realized.

Respectfully submitted,

ALAN C. RASSNER
15 Park Row
New York, N.Y. 10038
(212) 227-2618
Counsel of Record for Petitioner

SHAFTER & SHAFTER
Attorneys for Petitioner

RASSNER, RASSNER & OLMAN
Of Counsel for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1418

WILLIAM E. BLOOMER, JR.,

Petitioner,

LIBERTY MUTUAL INSURANCE CO. (as subrogee of CONNECTICUT TERMINAL CO.),

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA, AS AMICUS CURIAE

PAUL S. EDELMAN
99 Park Avenue
New York, New York 10016
(212) 687-8181
Attorney for Amicus Curiae and Chief Counsel

Of Counsel:

ARTHUR ABARBANEL
Chairman, Admiralty Section of Amicus Curiae
350 Fifth Avenue
New York, New York 10001

MICHAEL F. COLLEY
President of Amicus Curiae
536 South High Street
Columbus, Ohio 43215

THEODORE I. KOSKOFF
President-Elect and Chairman of Committee for Amicus Curiae
1241 Main Street
Bridgeport, Connecticut 06604

TABLE OF CONTENTS

CITATIONS

Cases:

PAGE

PAGE

Statement of Interest of the Amicus Curiae

The Association of Trial Lawyers of America is the successor to the American Trial Lawyers Association, a national bar association, consisting of more than 25,000 lawyers, primarily engaged in the practice of personal injury law and compensation law. The Admiralty Section of this Association consists of a substantial number of attorneys and proctors who specialize in maritime personal injury law. These attorneys represent members of the merchant marine and other maritime workers who are engaged in an especially hazardous industry, recognized as having a special status both by legislation and generally in the courts of the land. All of the maritime workers, not members of the crew of vessels, have a real and direct interest in the outcome of this appeal.

Said association is vitally concerned in the final outcome of this case since the decision will determine in large measure whether injured maritime workers will have the opportunity to employ experienced trial counsel to represent them, which can only be done by assuring a reasonable fee. This case will also decide whether an injured employee will in effect have to contribute to the portion of any third-party recovery turned over to the employer-compensation carrier for its lien, in the form of legal fees. Put in another way, is it equitable for a compensation carrier or employer to recover its entire lien without contributing to the costs, expenses and fees required to recover the lien from a negligent third party? At issue is whether the welfare of the injured employee or the protection of the compensation carrier is the factor most to be considered in enactment of the Longshoremen's and Harbor Workers Compensation Act.

A resolution of the issues in this case will materially affect not only the financial recovery of injured maritime workers, but is of paramount importance to hundreds of thousands of workers, to the admiralty bar representing

them, and to the maritime industry generally. By its decision, this Court will decide whether injured maritime workers will be able to procure proper legal representation to assure their rights and their economic future and well-being, and secure a fair share of a recovery. For the foregoing reasons it is respectfully prayed that this Honorable Court accept this brief Amicus Curiae.

Consent to file this brief has been sought from the parties herein, and the consent of petitioner and respondent has been received, as well as the consent of Amicus Curiae representing West Coast Stevedores.

PAUL S. EDELMAN,
of KREINDLER & KREINDLER,
99 Park Avenue,
New York, New York 10016.
Former Chairman,
Admiralty Section,
The Association of Trial
Lawyers of America,
Chief Counsel

Argument

The overwhelming weight of the authority among the states, and including the Federal Employees' Compensation Act is to have the employer or carrier (as subrogee) share in the attorney's fee in a third party action. No industrialized state allows an employer or carrier to recover its entire lien. This of course, leaves more for the employee who is the first beneficiary of the Longshoremen's Act.

An equitable doctrine prevails, nurtured by the United States Supreme Court that where an attorney recovers a fund not only for his client, but for others, the latter should share in the attorneys' fees. This doctrine has been the foundation for the various Courts of Appeal that have

required an employer-carrier to share equitably in a fee to the attorney hired by the employee in a third-party action.

The statute does not specify that the employer recovers its whole lien in a suit brought by the employee, nor does it specify who shares in payment of the fee of the successful attorney, but the statute is to be read liberally to protect the employee's interests above any other parties or the employer.

Prior to the 1972 amendments the lawyer recovered his fee from the employee's recovery. Congress did not legislate to curtail the attorney's fee nor to curtail the employee's recovery and make it subordinate to the recovery of the employer's full lien. Congress did legislate to promote the employee's interests in requiring the employer to pay a lawyer's fee in the compensation proceedings where there was a contested issue won by the employee. Congressional policy is to encourage the employee's lawyer to effectively represent him.

1. The Overwhelming Weight of Authority Is to Pay the Attorney for His Efforts in Recovering a Compensation Lien in a Third Party Action.

In 1970 New York was contemplating a statutory change to allow a lawyer to obtain a fee out of the portion of a third party recovery which was to be repaid to a compensations carrier for its lien. Subsequently, the statutory change was enacted.

An article on the subject was published by James B. Attleson, "Workmen's Compensation: Third Party Actions and the Apportionment of Attorney's Fees", 19 Buffalo L. Rev. 515 (1970). This article arose from a study made at the time by the New York State Law Revision Commission.

In the article a survey was made as to the background into versions of the various states' approach to workmen's compensation, its funding, the reservation of rights to a third party lawsuit, and the rights of the compensation carrier to recoup all or part of its compensation payments out of third party actions.

At the time some but not all the laws of various states were analyzed as to allowing the employee's attorney a fee for recovering moneys for the compensation carrier. He found that " . . . nearly all of the heavily industrialized states already provide some form of apportionment or statutory guarantee [to the employee]". (p. 543).

Although the discussion as to New York law is no longer relevant, as of 1970 the following highlights were observed:

> California, Michigan and Kansas allowed apportionment of fees on behalf of an employee's attorney, leaving the apportionment to the trial court without a specific statutory formula. (p. 532).
>
> Minnesota required the employer to bear a "proportion of the reasonable attorney's fees and costs" in collecting in a third party action. (pp. 532, 533).
>
> Pennsylvania and Maryland required payment of a pro-rated fee as well. (p. 533).

In fact, a fee was to be paid under the Pennsylvania laws of the *estimated future compensation* payments which were saved by reason of the third party recovery. (p. 533) (as noted *infra*, various other states adhere to this rule).

> In Indiana, New Jersey and Illinois, the employer-carrier pays stipulated attorneys' fees from the amount of liens recovered. The fees discussed varied from 25% to 33⅓%, in Indiana the difference being whether there is a settlement or a recovery after trial. (p. 534). In Massachusetts there was no provision for apportionment except as the employee and insurer might agree. But the employee would not be required to pay a more than proportionate fee. (p. 535, footnote 109).

Mr. Attleson discusses the basic economic premises of the compensation acts and the reservation of a right to pursue a damage claim against third parties. Compensation acts provide a minimum for the injured worker or his family; it is left to the third party action to recover full damages, including pain and suffering, not limited to schedules of percentage loss of earning capacity, or a limited statutory loss of earnings. (see pps. 516-520).

The author concludes in the following fashion:

> ". . . [Compensation] benefits represent only a fraction of the actual loss of earning capacity, but they are hardly adequate under any standard". (p. 519).
>
> • • •
>
> ". . . to deny the [third party] remedy may go further and increase the burden upon the public as a whole where the compensation benefits are in fact inadequate. . . ." (p. 520).
>
> • • •
>
> "More important for purposes of this study, the above catalog of benefits demonstrates that the cost of industrial injuries is *shared* by the employee and industry. *The employee absorbs a substantial portion of his loss.*" (p. 520). (emphasis supplied)
>
> • • •
>
> "Although benefits may be justifiably restricted, it is important to note again, that these limitations argue *for* third party actions, and, indeed, *encourage workers to pursue their common law remedy*" (p. 520). (emphasis supplied)

With this background in mind, the author discusses the social policy behind reimbursing the employee's attorney when he aids the employer or carrier to recover its lien.

> "Since the burden of industrial accidents is shared between employee and employer the question then becomes: *should* attorney's fees be allocated . . .?"
> "Sharing of fees is not inconsistent with compensation principles. Indeed, it would be consistent with the traditional principle of compensating injured employees. As referred to above, this principle, along with the acknowledged inadequacy of compensation benefits has justified the retention of third-party actions in the first place." (p. 541).

Does the carrier lose a substantial right when it reimburses the plaintiff-employee's attorney? The author thinks not. The only means of reducing a carrier's exposure is by recovery in the third party action.

> "A compensation carrier has no inherent right of subrogation, and in two states, carriers have no such rights." The carrier's recovery is a "windfall". "That is, this amount adds to the accident fund but is not based on any concurrent liability. The 'loss' suffered in the apportionment of attorney's fees can be considered as balancing this windfall." The author finds it inequitable that if the employer brings the third party action, it is reimbursed for its legal fees and expenses besides its lien. It is inequitable to make the employee bear the entire cost of attorney's fees when he sues. (pp. 542, 543).
>
> "Initially, as pointed out before, nearly all of the heavily industrialized states already provide for some form of apportionment or statutory guarantee." (p. 543).

It would be inequitable, he concludes, if the employee was "left with nothing after the attorney's fees and lien are subtracted . . . If this is the case, then the insurance carrier has received a windfall in that he has received funds, albeit a recoupment of prior expenses, without having to incur the normal expenses. In other words, the claimant has paid in order to reimburse the insurance firm." (p. 544).

Much of the latter discussions concerned a proposal to allow a carrier only to recover two-thirds of its lien. The author's conclusion is that this is an arbitrary way to allocate the cost of legal fees. "A better approach would be to leave it to the court to decide an appropriate distribution" (p. 544, footnote 135). He feels that judicial flexibility would be best in apportioning legal fees, since each case has its own variables.

The most recent annotation concerning the payment of a legal fee by the employer-compensation carrier is at 74 A.L.R. 3d. pages 854-953. It deals with the picture throughout the country, and is written by Thomas J. Goger.

Many states have an express provision for payment by the employer to a successful plaintiff-employee's lawyer; Florida, Illinois, Indiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York (since 1975), North Carolina, Pennsylvania, Utah, Virginia and Wyoming.

> Illinois' highest court justified that statute in order to prevent "unjust enrichment" to the employer in recovering its lien. Plaintiff's attorney recovered a single fee based on a single recovery. Their decisions are based on a "common fund" theory. *Reno* v. *Maryland Casualty Co.*, 27 Ill. 2d 245, 188 N.E. 2d 657 (1963).

The federal government in the Federal Employees' Compensation Act, 5 U.S.C., Sec. 8132 requires a refund to the

government of the amount of compensation paid, but *after* deducting the cost of suit and a reasonable attorney's fee.

In fact, some states allow an attorney's fee based on the total exposure of the employer-carrier, that is, not only compensation actually paid, but what the employer-carrier saves from future actuarial compensation liability.

> Indiana, Michigan, Minnesota, Missouri, Nebraska, New Jersey, Pennsylvania, Utah and Virginia.

As noted, some states require a contribution by the employer computed as a percentage of the employer's recovery which performs somewhat the same function as a contribution towards an attorney's fees. Wyoming is listed among these.

Other states allow recovery of the fee by the employee's attorney without specific statutory language:

> Kentucky (overruling prior authority), Louisiana (overruling prior precedent), and Oklahoma. New Mexico had a recent case requiring proportionate sharing. *Transport Indem. Co.* v. *Garcia,* 89 N.M. 342, 553 P. 2d 473.
>
> California requires apportionment on the theory that the plaintiff's attorney creates a fund for which the passive beneficiary, the employer should pay. *Quinn* v. *State,* 15 Cal. 3d 162, 124 Cal. Rptr. 1, 539 P. 2d 761 (1975) (disapproving other California lower court decisions).

Some states allow the employee's lawyer a fee and expenses as a first lien, but do not require an employer contribution.

> Arizona, Arkansas, Mississippi, Tennessee, Wisconsin. Alaska recently overruled prior precedent and now requires the employer to pay a fee. *Cooper* v. *Argonaut Co.,* 556 P. 2d 525.
>
> Montana was placed in an equivocal position.

But even in the above situation, if there is a deficiency, the employer ends up contributing to the first call of the plaintiff's attorney.

In some states there are cases where pro-ration of fees is allowed, where the employer also has a lawyer who contributes to the settlement or judgment, so that the employee's lawyer obtains a fee only for the percentage of the recovery attributable to his efforts. In the usual case under the present Longshoremen's Compensation Act, the employer cannot be impleaded and will not have its lawyer involved in the suit. In one unusual case where the employer was sued by a shipowner for property damage (although it could not be impleaded in a wrongful death action) and the case was consolidated with a death action, the Judge felt that an evidentiary hearing might be needed to decide how the fees would be apportioned.

Boncich v. *M. P. Howlett, Inc., et al.,* Docket No. 74 Civ. 1837 (E.D.N.Y. Feb. 13, 1978, J. Pratt, unreported and issue later settled between plaintiff's attorney and employer-carrier's attorney).

Some states do not charge the employer-carrier with the fee:

> Alabama, Georgia, Iowa, and Washington.
>
> Texas changed the law by statute in 1973 so that if the employer does not have an active attorney in the litigation, the fee is paid to plaintiff's attorney out of the employer's share as well.

It is thus apparent that *no* major industrialized state allows the employer to recover its whole lien without contributing to the plaintiff's lawyer, unless in some instances where the employer's own attorney contributed to the fund by his separate efforts. This confirms the observation made in the Buffalo Law Review article.

The weight of authority among the states, therefore, confirms a statement made in 7 Am.Jur.2d, Attorneys at Law, Sec. 204:

> "Unless the circumstances show that services were intended to be gratuitous, a party's acceptance of, or acquiescence in, the services rendered by an attorney will raise an implied promise to pay for the services." Citing *Bogorad* v. *Schwartz,* 208 F.2d 704 (4th Cir. 1953), and others.

The federal statute is modelled after the Workmen's Compensation Act of New York. New York precedents are given weight, but they are not necessarily followed.

In *Czaplicki* v. *The Hoegh Silvercloud,* 351 U.S. 525 (1956), a case dealing with the effect of an award on assignment of third party rights, the New York precedent was not followed. This Court made its own judgment of the to the employee in protecting his third party rights than issues involved, coming out with a decision more favorable New York decisions.

The only definitive opinion from the New York Court of Appeals discussing the relationship between the employee, his attorney and the carrier concerning the lien is *Curtin* v. *City of New York,* 287 N.Y. 338, 39 N.E.2d 903 (1942). This decision is solicitous of protecting the financial well-being of the employee. Under the language of the statute as it existed at that time, the Court quoted the language and held that the lienor recovers its lien:

> "'. . . after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery.' Subd. 1.".

This is the statutory language applied to the case which involved a deficiency situation where the recovery was

less than the compensation liability. The Court went on to state:

> "In that provision the Legislature has, in plain words, given recognition to the principle that *where one person without fault incurs expenses in creating a fund which inures to the benefit of another, he should be reimbursed* from that fund for the expenses so incurred. (emphasis supplied) In the application of that principle, there is no ground for distinction between a case where recovery has been had by a claimant after he has made claim for statutory compensation and a case where the proceeds of a recovery have been collected before the claim is made. The provision of the section that a person or corporation liable for payment of compensation shall have a lien upon the proceeds of a recovery and the provision of the same section that such a person or corporation must contribute only the deficiency, if any, between the amount of the recovery 'actually collected' and the compensation provided, are intended to carry out the same purpose in differing circumstances. They must be read together and each must be given the construction which will effectuate the legislative intent. So read, there can be no reasonable doubt that the words 'amount of the recovery * * * actually collected' are intended to mean 'actually collected' after the claimant has paid the expenses reasonably and necessarily incurred in obtaining any recovery. No artificial rule or canon of construction requires the court to disregard an intent so clearly indicated."

The only other New York Court of Appeals case relevant to the issue here (prior to the change in the statute) was a per curiam opinion affirming a lower court case which said the legislature should decide the issue of pro-ration of fees.

Kussack v. *Ring Construction Corp.*, 4 N.Y.2d 1011, 177 N.Y.S.2d 522, 152 N.E.2d 540 (1958), aff'g. 1 A.D.2d 634, 153 N.Y.S.2d 646.

A recommendation for a change in New York law was made by the Law Revision Commission in 1974, McKinney's Session Laws of N.Y., 1974, Vol. 2, p. 1906. By ch. 190, Laws of 1975, effective June 10, 1975, the New York statute was amended to require payment by the employer of the legal fees for recovery in third party actions. Vol. 198, McKinney's Session Laws, p. 293.

There can be no question that at the present time the overwhelming number of states allow the plaintiff's attorney a fee from the moneys received by the compensation carrier in payment of its lien. This is justified by the need to encourage suit in a proper case to recover full damages for an employee, which benefits both the employee and the compensation carrier. For the efforts of the plaintiff's attorney, the compensation carrier should pay its proportionate share of the expenses of recovery.

No major industrial state allows the carrier to recover its whole compensation expense without sharing the cost.

2. Where an Attorney's Efforts Bring About a Fund, Equity Traditionally Has Awarded a Fee.

A philosophical basis has existed in our law through many generations which justifies paying the lawyer a fee where he benefits someone besides his actual client through the efforts successfully made on his client's behalf.

Historically, courts have an equitable power to approve fees to an attorney who recovers or preserves a fund which benefits others besides his initial client. Although the Supreme Court recently denied a fee to be paid by the *losing party* in a case involving conservation law, the Court recognized the continued viability of the "common fund doctrine"

in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).

In fact, after the *Alyeska* decision, *supra*, Congress amended the statute, 42 U.S.C., Sec. 1988 to provide that in certain civil rights cases, the prevailing party could be awarded a reasonable attorney's fee, in the court's discretion.

Isaacs v. *Temple University*, 467 F. Supp. 67 (E.D. Pa. 1979) at pages 68 and 69.

In those cases as in the Longshoremen's Act amendments Congress wished to encourage citizens to seek their proper legal redress. As Judge van Artsdalen stated in the *Isaacs* case, *supra*, "The doors to federal courthouses must remain open to all who have justiciable federal causes of action". (p. 70).

The doctrine has been reviewed in at least two annotations, John P. Dawson in 87 Har. L. Rev. 8, p. 1597 (June, 1974) and by Jean F. Rydstrom, 42 A.L.R.Fed. 134.

Mr. Dawson indicates interestingly enough that the United States Supreme Court was the creator "almost single-handedly" of the "'common fund' as a source of counsel fees". (p. 1601).

The first landmark case was *Trustees* v. *Greenough*, 105 U.S. 527 (1881). Mr. Dawson sets out the facts as follows (p. 1601):

> "The State of Florida had conveyed to trustees more than ten million acres of state-owned land to provide security for a bond issue of the Florida Railroad Co. The trustees had collusively sold hundreds of thousands of acres at nominal prices and had failed to provide reserves for payment of interest and principal on the bonds. Vose, a large holder of the Railroad Company's bonds, sued to set aside the transfer as fraudulent and for the appointment of a receiver. After eleven years

of litigation at his own expense he had recaptured the looted assets and secured large payments to the bondholders, which they had accepted.

Vose, the client, then presented a claim for reimbursement of his lawyers' fees. The residue of the restored trust estate was still being administered by a receiver under the trial court's direction in the interest of the bondholders, so there was a fund under the court's 'control' that could be tapped. As the Supreme Court pointed out, if the trustees themselves had rightfully incurred these expenses in retrieving the assets for the trust, the expenses would have been chargeable to the trust estate, which by familiar rules must 'bear the expenses of its own administration'; Vose merely performed the trustees' duty. The Court concluded that to deny Vose contribution to the costs he had incurred

'would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; . . . [t]hey ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution' ".

The second landmark case is *Central Railroad & Banking Co.* v. *Pettus,* 113 U.S. 16 (1885). The claim was a direct claim for attorney's fees for a prior successful action benefitting a class of creditors of a railroad. The Court held that a fee should be paid by those who "accept the fruits" of the labors of others. A lien was given the lawyers to secure their fees, in addition to the fee received from the client.

A later case, often cited, is *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939). Sprague was a suitor seeking

the allocation among beneficiaries of certain bonds in a trust which secured money in a bank's trust account; the bonds had been sold by a receiver. Having established her right to certain of the bonds and impressing a trust, she established the rights of other beneficiaries, and she thereafter sought an allowance for her attorney's fees.

Justice Frankfurter delivered the opinion, and spoke at length of the historic powers of equity courts to award counsel fees under these circumstances. He noted that it was not a class action as such.

> "Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation." (p. 167)

Vaughan v. *Atkinson,* 369 U.S. 527 (1962) cites *Sprague* with this observation:

> ". . . allowance of counsel fees and other expenses entailed by litigation, but not included in the ordinary taxable costs regulated by statute, is 'part of the historic equity jurisdiction of Federal Courts' " (p. 530).

The *Vaughan* case held that a shipowner's willful failure to pay an employee maintenance rightfully due could lead to liability for damages and a legal fee.

In footnote 25 of his article, Mr. Dawson enumerates 28 decisions where the fund analogy was used successfully.

See also, *Nolte* v. *Hudson Navigation Co.*, 47 F.2d 166 (2nd Cir. 1931) (attorneys to be given added fees when they increased a fund for unsecured creditors; even though others had their own attorneys, this might not prevent contribution to the successful, active attorneys).

Doherty v. *Bress*, 104 App. D. C. 308, 262 F.2d 20 (D.C. Cir. 1958), cert. den., 359 U.S 934 (1959) was a multiple disaster case. One attorney was designated to bring a test case to trial. He recovered an extra fee from a subrogee insurance company which benefited from his efforts, although the lawyer was never hired as such and in fact the insurance company refused to consent to his acting as chief counsel.

Mr. Dawson's article also discusses the situation which may arise where lawyers for different parties contribute to the fund, possibly equally, possibly unequally. The court would have inherent discretion to adjust the fees (pp. 1648, 1649) based on effort. In fact, as noted below, there are cases, like multiple disaster cases where the attorney who does the lion's share of the work may be awarded something from the fees of inactive or less active lawyers who have benefited from the effort.

Mr. Dawson is not in favor of the award of fees to a successful party, but he acknowledges that the cases do favor the financial encouragement of a lawyer to exert his energies for the benefit of his clients and others in the same position as his clients.

In other more recent cases, involving multiple disaster suits against air lines, the common fund doctrine has been applied to give a fee to the lawyers who were designated to bring the actions to a successful conclusion. Their activities benefited other parties, and as lead counsel, they did the work that the bystanding attorneys did not. In one case, the lower court proceeded on concepts of quasi-contract and restitution. On appeal, the court found that

there was a fund, court control, and that the fees should be paid to the lead counsel even though each plaintiff had his own attorney. Lead counsel had had the laboring oar from which all benefited. *Vincent* v. *Hughes Air West, Inc.*, 557 F. 2d 759 (9th Cir. 1977). Accord. *In Re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th Cir. 1977). In the latter case, the court found that the court-appointed committee of lawyers bore responsibilities beyond their own individual cases, and their activities served the interests of the court, the litigants and other counsel as well as the need to push the cases to a conclusion in a reasonable time. The Court also had support in the Manual for Complex Litigation, widely used in multiple claim cases.

Because of the long history of this "common fund" doctrine, it has been widely used in the analysis favoring the employee in the situation at bar. *Swift* v. *Bolten*, 517 F.2d 368, 370 (4th Cir. 1975) which supports the Petitioner's position, refers to *Vaughan* v. *Atkinson, supra* and *Sheris* v. *Travelers Ins. Co.*, 491 F.2d 603 (4th Cir. 1974) cert. den., 419 U.S. 831.

The fund argument was also referred to in the Second Circuit case preceding the case at bar, *Valentino* v. *Rickners Rhederei G.M.B.H., S.S. Etha*, 552 F. 2d 466 (1977). There, referring to the *Sprague* Case, supra, Judge Meskill stated, "charging the fund with the expense of recovering it is in keeping with the statutory scheme". (p. 470).

The *Valentino* court also said (p. 468):

> "It is a well-established principle of equity that a lawyer who creates a fund for the benefit of another is entitled to reasonable compensation for his efforts".

Petitioner respectfully suggests that the view expressed in 1977 by the Second Circuit should have been followed in 1978 in the decision below, and should be again reaffirmed

in this Court in recognizing the equitable argument in Petitioner's favor.

3. The Longshoremen's Act Amendment Encourages Proper Legal Representation for the Claimant by Allowing Legal Fees in Contested Matters.

Under the prior Longshoremen's and Harbor Workers' Compensation Act, the longshoreman paid his attorney an approved fee out of his compensation recovery, and those fees were usually penurious, to say the least. *DiCostanzo* v. *Willard*, 165 F.Supp. 535 (E.D.N.Y. 1958) (a case where a fee of $175.00 was increased substantially but was still negligible compared to the benefits recovered and time expended by counsel, whom the court described as an able and experienced longshoremen's compensation practitioner).

The 1972 Amendments to the Compensation Act, 33 U.S.C., brought into the law a minority concept of the "add-on" attorneys fees in contested workmen's compensation cases in which the insurance carrier is ordered to pay claimant's lawyers his fees and expenses for securing benefits for the employee which were refused by the carrier. 33 U.S.C.A. 928 (a) (b). Not many jurisdictions make this provision in the law, Florida being one of the few states that does. See, Larson, Workmen's Compensation, Section 83.13.

It is therefore quite apparent that the prior provision of paying the fee out of the injured man's or widow's award made it impracticable for an attorney, particularly one of experience and competence, to handle contested cases since the deputy commissioners approve only the most minimal fees.

Preparation had to be scanty due to economic considerations and medical reports substituted for testimony.

Rarely would the claimant have his own doctor; and those who did, usually did not have live testimony, only reports. This was the situation where the claimant had no third-party action.

To correct that gross inequity, which for all practicality deprived claimants of counsel in adversary proceedings against well-paid insurance representatives, the LHWCA was amended. Another reason for the amendment was the attempt by Congress to limit third-party actions by longshoremen by denying unseaworthiness recoveries. Those actions formerly provided their attorneys with a means of being compensated for services, so that the claimants' attorney usually handled the compensation proceedings as part of his overall representation of the injured man, looking to the third-party phase of the total litigation for his ultimate fee.

As part and parcel of their overall representation of their clients most claimants' lawyers were therefore well-prepared for the compensation proceedings with competent medical testimony and witnesses if the accident were contested. But in the third party proceedings the fee awarded had to cover not only the attorney's services, but also the expenses of bringing in the doctors and witnesses and the costs of transcripts and depositions.

The 1972 amendments were designed to correct this disparity between the advocacy of counsel representing the insurance carriers in the adversary proceedings and those the claimant could afford. Since the claimant seeks benefits for loss of work, it is self-evident he can't pay a lawyer or expenses out of his pocket; if he could afford it, payments must still be approved under penalty of law. Section 928(g). It is therefore apparent the lawyer must depend on successfully handling the claim to be paid a fee and *recover* expenses. Also, since some claims will be unsuccessfully concluded, as they must in any adversary system, the attorney should be paid adequately in successful

cases to compensate for accepting a class of litigation which does not assure payment, and where a fee is contingent.

Section 928 (a) provides for the payment of attorneys fees and expenses by the carrier if benefits are not paid within 30 days after notice of claim, or after 14 days after recommendation of payment by the deputy commissioner. If an offer of payment is made and rejected by the claimant, Section 928 (b) provides:

> "If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation."

Fees are approved by the tribunal involved and are also awarded on successful appeals before the Benefits Review Board and the Courts of Appeals. Section 928 (b) (c). The Fifth Circuit has approved a fee of $1,000 for a brief and appearance before the Benefits Review Board ("BRB") and directed an additional fee for brief and argument in that court on appeal. *Ayers Steamship Co.* v. *Bryant,* 544 F.2d. 812, 5BRBS 317 (5th Cir. 1977); see, *Atlantic & Gulf Stevedores* v. *Aleksiejczyk,* 542 F.2d 602 (3d Cir. 1976). The constitutionality of the procedures for setting fees has also been upheld. *Jacksonville Shipyards, Inc.* v. *Perdue,* 539 F.2d 533 (5th Cir. 1976).

The basis for the award of fees to successful claimants is contained in the committee reports and legislative history of P. L. 92-576, U. S. Cong. & Adm. News, 1972, pages 4706, 4717.

As one of the very few statutes allowing fees to be paid at the carrier's expense where there is a dispute, it is

obvious that the statute is meant to encourage good lawyers to spend the necessary time, effort and skill to properly protect a claimant's right.

This same philosophy of encouraging proper representation for claimants should spill over in terms of a lawyer receiving an inducement to take the third party actions. At the present time the possibility of recovery in third party actions is more restricted than prior to the amendment. There is no longer an unseaworthiness claim or exposure by the employer which previously aided settlement. The liens are larger including the much higher hospital and medical expenses of recent years, and a net settlement after repayment of the lien would be less today than before the amendments so far as the employee is concerned.

Unless a lawyer receives a fee out of the compensation lien recovery, the routine or small third party action may not be prosecuted to its fullest possible extent. The realities are that the maritime worker unless he has a devastating injury and a clean-cut negligence claim may have a hard time in obtaining properly trained attorneys. If the lien is so large and the sums allocated to the employee are relatively small, a lawyer would not in good conscience claim all the fee he is entitled to. On the other hand, if the employee waives his right to sue, there are practical impediments to an action by the employer-stevedore or other maritime employers in their relationships with their customers which make it unusual for the stevedore-employer to sue the shipowner. See *Brown* v. *American Mail Line, Ltd.,* 437 F. Supp. 628 (D.C. Ore. 1977). There the court held that the longshoreman's attorneys were entitled to a reasonable fee out of the carrier's lien; and *Valentino* v. *Rickners Rhederei, G.M.B.H. S.S. Etha,* 552 F.2d 466 (2nd Cir. 1977). The Brown case, in footnote 2 refers to *Valentino,* which observed at 552 F. 2d 469 "that during oral argument, 'both parties stated that stevedores do not, as a practical matter, pursue these

lawsuits—presumably for fear of antagonizing their customers' ".

In this legislation, it is the employee who is the primary concern of Congress. His rights to seek out competent counsel were meant to be strengthened and encouraged.

And in fact it is only in a third party damage recovery that the employee *and* employer can recover their losses, and spread the costs of the injury. See *Brown* v. *American Mail Line, Ltd., supra.*

So, with effective representation the employee and employer are on the same side where the 1972 amendments meant them to be. They have a common interest against a third party.

4. The Statute Does Not Specify What Is to Be Done in This Case, But the Implications Are Clear.

The statute is not specific in providing an attorney's fee on the whole recovery where the employee sues a third party. The Act only has provision for the situation where the *employer* prosecutes the third-party suit. Sec. 933(e). But there, the *employee* shares in the legal costs since only a net figure can benefit him. Equity would mandate then that the *employer* also share in the costs of producing the fund when the suit is brought by the employee.

Such a discrepancy in the Act has been explained by the history of the Act since 1927. As originally drawn, the Act contemplated that the employer would ordinarily bring the third party suit. It was not until a 1959 amendment that the employee was allowed to take a compensation award and retain for six months the right to sue the third party.

Edmonds v. *Compagnie Generale Transatlantique,* decided by the Supreme Court June 27, 1979 at page 13 made note of the history of the Act. When the longshoreman sues, the employer has a lien which is "judicially created" since it is not statutory. In 1972 Congress left intact the rights of the employer where it brings suit including the costs of suit, but did not deal with the mechanics of suit brought by the employee, except to limit him to a negligence claim.

What is the philosophy behind the 1972 amendment? It is obviously to maximize the employee's recovery when injured in a trade where wages are high, but where the risk of injury is among the highest. And this at the least cost.

But the intent was *not to benefit* the compensation carrier at the employee's expense, which is a repugnant philosophy verbalized in *Cella* v. *Partenreederei M. S. Ravenna,* 529 F.2d 15 (1st Cir. 1975) cert. den., 425 U. S. 975 (1976).

In *Director, Office of Workers' Compensation Programs, et al.* v. *Rasmussen,* —— U. S. ——, 59 L.Ed. 2d 122 (1979), the Supreme Court only last February of 1979 dealt with the arguments made to conserve the compensation carrier's assets at the expense of a deceased employee's family. This the Court rejected. The language of the LSHWA statute and its legislative history were read to be protective of the employee, not the insurers even though the result was an open-ended exposure for death benefits.

In *Edmonds* v. *Compagnie Generale Transatlantique,* —— U. S. ——, decided June 27, 1979, the Court had before it the issue of whether an injured longshoreman should recover his total damages against a shipowner even where his employer or co-employee was also negligent. It was held that the employee does recover his total damages, less his contributory negligence, because the shipowner is a joint tort-feasor. Although negligent, the stevedore-carrier recovers the compensation paid from out of the plaintiff's damages. The lien is repaid by statute where the employer sues, and by court decision where the employee sues.

At page 12 of the decision, Justice White stated:

> "Congress clearly contemplated that the employee be free to sue the third-party vessel, to prove negligence and causation on the vessel's part, and to have the total damages set by the court or jury without regard to the benefits he has received or to which he may be entitled under the Act."

At page 13 of the decision, the Court held:

> "Some inequity appears inevitable in the present statutory scheme, but we find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoreman whom the Act seeks to protect."

At page 14 the Court held that it will not restrict the employee's rights because the Act is "a remedial act", citing *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 278, 279 (1977).

According to other cases as well, the Act is to be "liberally construed in favor of the workman", *Strachan Shipping Co.* v. *Melvin*, 327 F.2d 83, 86 (5th Cir. 1964). *Voris* v. *Eikel*, 346 U.S. 328 (1953). *Strachan, supra*, and the view expressed in *Mitchell* v. *Scheepvaart Maatschappij Trans-Ocean*, 579 F.2d 1274 (5th Cir. 1978), more clearly express the purposes of liberality favorable to the employee. Judge Rubin in the *Mitchell* case sought an equitable formula which would strike an appropriate balance between the twin goals of protecting the injured employee and conserving compensation funds. He reasoned that the best way to preserve the compensation carriers was to encourage proper representation and prosecution of the third party action. The court could make an equitable proration of the fee based on various factors including the reasonableness of the fee to be paid by the carrier. As noted, at the present posture of most third party actions it

would be unusual for the employer-carrier or its attorneys to be involved in the third party suit. See, *Edmonds, supra,* at page 14 of the opinion.

The Fifth Circuit relied on a theory of equitable reallocation closely following the opinion of the Fourth Circuit in *Swift* v. *Bolten*, 517 F.2d 368 (4th Cir. 1975). *Swift* notes that the employer is no longer made a party and has no obligation to indemnify under the 1972 amendments. When the employer receives a pecuniary benefit from the employee's successful negligence suit, "the stevedore [employer] should be taxed with that part of a reasonable fee for the longshoreman's counsel as is proportioned to its share of the recovery" (p. at p. 370). See also, *Liberty Mutual Ins. Co.* v. *Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977).

Since the statute is not explicit, this Court's dilemma has been properly answered in *Chouest* v. *A & P Boat Rentals, Inc.*, 472 F.2d 1026, 1036 (5th Cir. 1972) cert. den., 412 U.S. 949, where the third party recovery was insufficient.

> "Congress has not spelled out a formula for dividing the recovery in employee-initiated third party actions. Perhaps it did not do so because it could foresee the variables outlined in the preceding part of our opinion today, and concluded that detailed statutory treatment would be inappropriate. Until Congress does provide a specific formula, it is our responsibility to divide third party recoveries in the manner we feel best accords with the purpose of Congress in enacting the LHCA — to provide a swift and efficient compensation scheme for maritime workers *while preserving intact a viable right of damages against third parties for sums beyond those minimum sums authorized as compensation.*" (emphasis added).

5. This Court Should Follow Congressional Intent in Allowing an Attorney's Fee.

Edmonds v. *Compagnie Generale Transatlantique, supra,* decided by this Court on June 27, 1979 analyzed the Court's dilemma where the Act is not explicit, but where it was amended by Congress with the law in mind as it existed prior to the amendments in 1972.

Prior to the 1972 amendments, the employee could recover his complete damages from the shipowner or third party, whereby the attorneys received their fee on the recovery. At that time the employer was often impleaded, but in the last analysis, recovered its lien.

Nothing was done by Congress in 1972 to change the attorney's fee on the third party recovery.

As the *Edmonds* decision notes (p. 2):

> "Admiralty law is judge-made law to a great extent, *United States* v. *Reliable Transfer Co.,* 421 U.S. 397, 409 (1975); *Fitzgerald* v. *United States Lines Co.,* 374 U.S. 16, 20 (1963) . . .".

At pages 15 and 16 of the *Edmonds* opinion, this Court noted that:

> "In 1972 Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law that it chose not to change. * * * By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases advise, we should stay our hand in these circumstances . . . Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them."

On the basis of the pre-1972 recoveries, and the relationship of the attorney and employee, now that *Edmonds* has confirmed a full damage recovery by the employee, the attorney should still be able to have a reasonable contingent fee. Nothing was done or even discussed by Congress in relation to fees except in the compensation proceeding itself.

The decision sought by Petitioner therefore accords with Congress' understanding of the situation, and the Court is empowered to make this relationship explicit.

Conclusion

The Longshoremen's Act by implication and by its requirement for a liberal interpretation in favor of a claimant-employee, read in conjunction with specific reference to attorneys' fees leads to the conclusion that in a successful third party action the employer-compensation carrier should make a reasonable fee available to the employee's attorney. Such a rule will encourage proper representation which protects the employee, but also will encourage recovery of the lien which overall will be for the benefit of the insurers. Equity has traditionally allowed a legal fee where an attorney's efforts create a fund which benefits others besides his own client. The weight of authority among the states overwhelmingly encourages this pro-ration of attorneys fees and the changes in the Act in 1972 make the employer and its carrier a passive party only, in the usual case, whose interests now coincide with the interests of the employee. See *Edmonds* v. *Compagnie Generale Transatlantique, supra,* page 14.

Decisions of the Fourth and Fifth Circuits and the Oregon District Court are more in line with the purposes of the Act than the decision below.

Respectfully submitted,

PAUL S. EDELMAN
99 Park Avenue
New York, New York 10016
212 687-8181
Attorney for Amicus Curiae and Chief Counsel

Of Counsel:

ARTHUR ABARBANEL, Esq.
Chairman, Admiralty Section of
Amicus Curiae
350 Fifth Avenue
New York, New York 10001

MICHAEL F. COLLEY, Esq.
President of Amicus Curiae
536 South High Street
Columbus, Ohio 43215

THEODORE I. KOSKOFF, Esq.
1241 Main Street
Bridgeport, Connecticut 06604

Certificate.

This is to certify that on the day of July, 1979, copies of this brief were served on:

ALAN C. RASSNER, Esq.
RASSNER, RASSNER & OLMAN
Counsel to Petitioner
15 Park Row
New York, New York 10038

DOUGLAS A. BOECKMANN, Esq.
SEMEL, MCLAUGHLIN & BOECKMANN
10 Rockefeller Plaza
New York, New York 10020

LINDSAY, NAHSTOLL, HART, NEIL & WEIGLER, Esqs.
The Carriage House
1331 S. W. Broadway
Portland, Oregon 97201
Attorneys for Master Contracting
Stevedore Assn. of the Pacific Coast, Inc.
amicus curiae

In the Supreme Court

of the United States

OCTOBER TERM, 1978

No. 78-1418

WILLIAM E. BLOOMER, JR.,
Petitioner,

against

LIBERTY MUTUAL INSURANCE COMPANY,
as subrogee of
CONNECTICUT TERMINAL COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC.

DENNIS LINDSAY
ROBERT BABCOCK
1331 S. W. Broadway
Portland, Oregon 97201
(503) 226-1191
Attorneys for Amicus Curiae Master Contracting Stevedore Association of the Pacific Coast, Inc.

LINDSAY, NAHSTOLL, HART,
NEIL & WEIGLER
Of Counsel

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 798

INDEX

TABLE OF AUTHORITIES

In the Supreme Court

of the United States

OCTOBER TERM, 1978

No. 78-1418

WILLIAM E. BLOOMER, JR.,
Petitioner,

against

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Master Contracting Stevedore Association of the Pacific Coast, Inc. is a trade association of the 26 member firms who provide substantially all contract stevedoring services at California, Oregon and Washington ports.

All members of the Association employ longshoremen and secure the payment of compensation for their employees pursuant to the Longshoremen's and Harbor Workers' Compensation Act. The Association and its members are vitally concerned that the Act and its

1972 amendments be applied in accordance with the intent of Congress.

For years prior to the enactment of the 1972 amendments to the Act, the Association and its members joined with other maritime industry groups in testifying on bills which culminated in the 1972 amendments to the Act. In exchange for its support of a substantially increased employee benefit structure, the Association sought to eliminate third party actions by longshoremen against vessels based upon the "warranty of seaworthiness" and, most importantly, the resultant indemnity actions by vessels against stevedore employers.

The primary purpose of the Association's support of the 1972 amendments was to reduce the expenses of frequent litigation which, as both Senate and House of Representatives Reports summarizing the 1972 amendments recognized, had

> ". . . seldom resulted in a real increase in actual benefits for injured workers." (S. Rep. No. 92-1125, 92nd Cong., 2nd Sess. at 4 (1972))

A major expense of the litigation (nearly always three-way with three sets of attorneys) was legal fees. The amendments sought to remove stevedores from third-party cases and to free monies previously paid lawyers for payment of actual benefits to employees.

The position advanced by Petitioner would impose upon stevedores substantially the same legal expenses and burdens that the 1972 amendments sought to remove.

Consent to file this brief has been granted by Petitioner and Respondent.

SUMMARY OF ARGUMENT

The Second Circuit's conclusion should be upheld. A reversal of the Second Circuit's conclusion — which would require reduction of the lien in order to provide greater fees to attorneys for those injured workers who elect to step outside the compensation framework and settle their third party actions without consent of their employers — will have the following effects:

> (a) Such a reversal will provide an incentive to injured workers and their lawyers to trade the protections afforded by the Act and thought necessary by Congress for the "quick money" available from unapproved settlements;
>
> (b) Such a reversal will provide an incentive to employers to lower their lien and resulting contribution by restricting voluntary payments of compensation benefits to the lowest possible level; and
>
> (c) Such a reversal will provide an incentive for the marginal third party actions which the 1972 amendments sought to discourage.

When viewed against the background of actual practice, the Second Circuit's decision denying the requested fee apportionment is seen as a valid means of assuring that employers' compensation funds will be available for all injured workers.

In large part, this proceeding raises an issue already considered by this Court in *Edmonds* v. *Compagnie Generale Transatlantique*, — U.S. — (June 27, 1979). In *Edmonds*, shipowner's attack on the integrity of the stevedore's lien reimbursement rights was rejected. Petitioner here mounts a similar attack, arguing that portions of the stevedore's lien should be devoted to defraying the costs of a particular third party action. As in *Edmonds*, the attack on the lien should be rejected. The lien amounts should be fully repaid and later available for the delivery of compensation benefits to injured workers.

THE FRAMEWORK

Until 1972, most "time loss" injuries to longshoremen resulted in action against the vessel. Typically, the action was brought during the period when the longshoreman and his family were subsisting on a weekly compensation benefit of $70 per week. With the assistance of *Sieracki's*[1] unseaworthiness remedy, the prospects for recovery were excellent.

The shipowner was seldom the true "defendant in interest." Comforted by the realization that *Ryan*[2] and its progeny provided a similarly excellent route to indemnification and aided by business realities, most vessel owners successfully tendered the defense of the longshoreman's action to the longshoreman's employer

---

[1] *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 25 (1946).

[2] *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.*, 350 U. S. 124 (1956).

— a stevedore company in large part dependent upon the shipowner for continued economic survival.[3]

Despite case headings reflecting a worker versus foreign shipowner dispute, the actual opponents were the compensation-receiving employee and the compensation-paying employer.

Faced with the choice between a probable adverse judgment or settlement, most stevedores opted for the latter and through highly expensive insurance funded the following costs of their employees' injuries:

(1) Direct payment of compensation and medical benefits pursuant to the Act;[4]

(2) Direct payment of the ultimate third party settlement or judgment to the longshoreman;

(3) Direct payment of the stevedore's attorneys' fees;

(4) Direct payment of the shipowner's fees incurred in initial defense efforts; and

(5) Indirect payment of the longshoreman's attorneys' fees.

---

[3] Association members accepted the defense tenders in the majority of cases. The scoreboard of cases involving rejected tenders offers eloquent support for the wisdom of acceptance.

[4] This amount was technically "recouped" by the stevedore via repayment out of the litigation recovery which it funded. The total amount was of minimal significance. The total of temporary disability benefits paid at a maximum of $70 per week did not even approach the total benefits paid at an average rate of approximately $350.00. The amounts at issue in this proceeding total millions.

Drained by the amounts being paid to attorneys (their own, shipowners', and plaintiffs'), the stevedores resisted long overdue increases in compensation benefit levels, arguing that increases could be borne only if the costs of litigation were removed. *Cella* v. *Partenreederei MS Ravenna*, 529 F.2d 15, at 20-21 (1st Cir. 1975), cert. den. 425 U.S. 975 (1976).

In 1972, Congress agreed that this litigation had provided no real increase in benefits for injured workers, accepted the arguments advanced by stevedores, and, in return for the stevedores' agreement to pay much higher benefit levels, took action to both restrict the frequency of litigation and assure that stevedores would no longer bear the expense of what litigation remained permissible. Senate Report No. 92-1125, 92nd Cong., 2nd Sess., pp. 4-5 (1972).

Despite differences among the various Circuits regarding the legal standards necessary to support vessels' third party liability, it is clear that the frequency of litigation has declined. This Court has recently affirmed Congress' intent to effectively insulate stevedores from what litigation remains. *Edmonds* v. *Compagnie Generale Transatlantique, supra.*

The typical post-1972 injury no longer results in expensive and protracted litigation. The Act's benefits are both generous and prompt. Disputes are resolved within a more speedy administrative arena in which participation by able plaintiffs' attorneys is amply rewarded.[5]

---

[5] A short review of the many "attorneys' fee" decisions issued by the Benefits Review Board demonstrates that all contested cases resulting in a compensation award higher than earlier offered by the employer are followed by an assessment of an additional amount for the claimant's attorneys' fees. The assessed fees are substantial, averaging $80 to $100 per hour on the West Coast.

The minority of injuries resulting in litigation now present a different pattern. Shipowners must actually defend, rather than simply seek indemnity. The plaintiff's prospects for a recovery exceeding the Act's remedies have been lessened. The stevedores stay out of the courtroom.

However, part of the litigation process remains unchanged. Cases are still resolved by only two routes — settlement and judgment.

Judgment assures the successful plaintiff's attorney of his full contractual fee, be it 25%, 35%, or 50%, of the amount recovered. Whatever the trial's result, the longshoreman remains assured of his *full* compensation entitlement.[6]

Settlement of litigation is properly treated separately and may take one of two different forms.

---

[6] 33 USC §933(f) applies whenever a third-party action proceeds to judgment or is settled with the employer's formal consent and requires the Secretary of Labor to determine the extent of the employer's further compensation liability — the so-called "deficiency exposure."

This determination necessarily requires the Secretary to ascertain the difference between (a) the total amount payable to the longshoreman as a result of his injury pursuant to the Act and (b) the "amount recovered against" the third party. The Secretary and his Deputy Commissioners have consistently ruled that the amount "recovered against" the third party is determined *after* deduction of the employee's attorneys' fees. See *Voris* v. *Gulf-Tide Stevedores*, 211 F.2d 549 (5th Cir. 1954).

If the longshoreman's attorney successfully negotiates with the stevedore and obtains a formal written approval of the proposed settlement, the plaintiff's attorney again receives his agreed fee — 25%, 35%, or 50% of the settlement funds paid by the shipowner. And, again, the longshoreman remains assured of receiving the full benefit afforded him by the Act.[7]

It is only where the stevedore's formal written approval to the proposed settlement is not obtained that disputes such as this arise because only *unapproved* settlements effectively terminate the longshoreman's remaining compensation entitlement and remove the worker from the Act's protective framework. 33 USC §933(g).

ARGUMENT

Viewed against this necessary background, this Amicus suggests that the "Question Presented For Review" is far too broadly phrased by Petitioner Bloomer,[8] and that, more correctly phrased, the Question should read as follows:

"When a longshoreman *settles* his action

---

[7] As in the case of litigation terminated by judgment, the longshoreman who negotiates settlement with his employer's formal written consent remains entitled to the Act's benefits, offset by a "credit" determined *after* deduction of the fees and expenses of trial.

"This is essential to effectuate the statutory purpose of giving the worker his minimum benefit." (*Strachan Shipping Co.* v. *Melvin*, 327 F.2d 83, at 89 (5th Cir. 1964) (J. Brown, Dissenting).

against a shipowner *without* first negotiating for and obtaining his employer's formal consent to the proposed settlement, is his attorney entitled to additional fees because his efforts for his client also satisfy an existing equitable lien?"

This Amicus suggest that an affirmative answer to this question will serve as an incentive only to the marginal litigation sought to be reduced by Congress, will encourage "quick money" settlements contrary to the injured workers' long-term interests, and will require stevedores to partially fund exactly those costs for which Congress thought insulation necessary.

A negative answer to this question will neither foreclose injured longshoremen from able representation nor need it work an inequitable recovery allocation.

Each of the positions advanced by this Amicus are discussed more fully below.

The Equities Support Full Lien Reinbursement

The distribution of the $60,000 settlement proceeds involved in this proceeding is outlined at page 7 of Petitioner's Brief:

---

[8] Petitioner Bloomer phrases the question with the following language:

"When a longshoreman's suit against a shipowner results in a recovery exceeding the workmen's compensation lien, does the stevedore-employer (or compensation insurance carrier) recover its entire lien from the longshoreman's recovery, or must it share proportionately in the longshoreman's costs of obtaining that recovery, including attorneys' fees?" (Petitioner's Brief, p. 6)

"Recovery	$60,000.00
Less Expenses:	(202.80)
Balance for Distribution	59,797.20
Less Fee of One-Third	(19,932.40)
Balance	39,864.80
Less Entire Lien of Liberty Mutual	(17,152.83)
Net to Mr. Bloomer	$22,152.83"

This Amicus suggests that a more appropriate procedure would have excluded the lien amounts from the base used for computing the contingent fee. After all, the payments to Mr. Bloomer comprising the lien were mandated by Congress — not achieved by the attorneys' efforts.

If distributed in accordance with this Amicus' suggestion, the attorneys' fees would have totaled $14,213.37, and Mr. Bloomer's net recovery would have increased to $28,362.20 — approximately the same amount which will result if the additional amounts sought here are awarded.

Petitioner's attempt seeks no more money for Mr. Bloomer than would be payable under at least one "reasonable" allocation procedure. Instead, it seeks more money for Mr. Bloomer's attorneys than would result from the suggested approach, and seeks that additional amount from the stevedore's compensation insurance carrier.

Two arguments are advanced in support of this attempt: (a) That a greater fee is necessary to draw able plaintiffs' lawyers into the arena, and (b) that the equity-based "common fund" doctrine requires all beneficiaries of the litigation to contribute to its costs.

The "necessity" issue has vitality only in the context of "small or routine" cases — the marginal litigation discussed at pages 12-14, *infra*. It is clear that a fee of over $14,000 — the amount payable if the agreed percentage fee were applied only to the recovery actually achieved by Mr. Bloomer's attorneys — is sufficient to procure many able lawyers.

The surface plausibility of the equitable or "common fund" argument[9] is dispelled if the realities of third party litigation are considered.

The ultimate measure of settlement is the bottom line — the "new money" amount payable to the plaintiff. $22,152.83 was a sufficient "new money" recovery for Mr. Bloomer. Thus, a total settlement of slightly over $33,000 (including Mr. Bloomer's attorneys' one-third fee) would have sufficed to settle Mr. Bloomer's action had there been no lien repayment obligation at all.

However, the presence of the repayment obligation and the decision to base the attorneys' fees on the *gross* amount payable by shipowner mandated a $27,000 increase in the "gross" in order to achieve the same "net." Mr. Bloomer's attorneys received $9,000 from that increase, bringing their total fee to almost $20,000.

In short, Mr. Bloomer's attorneys (and, presumably, Mr. Bloomer) have already benefitted greatly

---

[9] Because the current vitality of the "common fund" doctrine is more squarely at issue in another proceeding now pending before this Court, *Boeing Co.* v. *Van Gemert*, No. 78-1327, review granted May 14, 1979, this issue is discussed only briefly.

from the lien — at shipowner's expense. The question is whether they are entitled to further benefits — this time at the expense of the stevedore which has fulfilled both its obligation to its employee and its duties of compliance with the requirements of the Act.

This Amicus suggests that further benefits should be denied and both "equity" and the purposes of the Act are furthered if *all* of the amounts paid to Mr. Bloomer as compensation are repaid to the stevedore's carrier.

The Requested Additional Payments Will Encourage Marginal Litigation.

One argument advanced in favor of Petitioner's allocation proposal is that a contrary approach would discourage litigation and, indirectly, remove one source of funding compensation benefits for other injured workers. *Brown* v. *American Mail Line, Ltd.*, 437 F. Supp. 628 (D. Or. 1977), appeal pending, Docket No. 78-1053, Ninth Circuit Court of Appeals.

The plaintiffs' bar echoes this position, noting that

> ". . . And in fact it is only in a third party damage recovery that the employee *and* employer can recover their losses and spread the costs of injury. . . ." (Brief of Amicus Association of American Trial Lawyers, p. 22)

Denial of additional recovery *will* discourage some litigation. However, this Amicus suggests that the only litigation discouraged will be that offering only a marginal likelihood of a dollar recovery exceeding the Act's compensation guarantees.

The Brief submitted on behalf of the plaintiffs' bar recognizes that only marginal litigation will be discouraged.

> ". . . Unless a lawyer receives a fee out of the compensation lien recovery, the *routine or small third party action* may not be prosecuted to its fullest extent." (Brief of Amicus Association of American Trial Lawyers, p. 21, Emphasis added.)

Discouraging marginal litigation is exactly what Congress intended.

> "The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in such cases. The Committee also heard testimony that in some cases workers were being encouraged not to file their claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action. The Committee's attention was also called to the decision in 1976 of the United States District Court in Philadelphia concerning the impact of third party claims involving

injured longshoremen on the backlog of personal injury cases in that Court." (Senate Report No. 92-1125, 92nd Cong., 2nd Sess., at 9 (1972).)

Where the probable recovery substantially exceeds the benefits provided by the Act, third party actions will be prosecuted without additional incentives. Where the probable recovery is itself an insufficient incentive, the prosecution of "routine or small" third party actions should be discouraged.

Acceptance of Petitioner's Allocation Proposal Will Encourage Short-Sighted "Quick Money" Settlements and Threaten the Act's Goal of Prompt and Voluntary Payments of Compensation.

Petitioner suggests that the earlier rulings rejecting the attempt here presented are no longer applicable because of the erasure of stevedore indemnity exposure in 1972. According to Petitioner, the employee and his employer now occupy the "same side" with a common interest in third-party recoveries and, therefore, a common obligation to pay the costs of creating the recovery.

Although this position ignores the business realities inherent in any process pitting a seller of services (the stevedore) against his sole market (shipowners), it does possess an element of truth. At least for the short run, many employers would welcome a procedure increasing the number of cases in which total compensation costs are limited to only a portion of the temporary benefits actually paid and future exposures, such as liability for permanent disability, future medical

benefits, and possible later worsening of medical conditions are foreclosed.[10]

However, it is clear that Congress felt that the Act — and not its avoidance — offered the best protection to injured workers.

If Petitioner is correct that the Circuit Court's ruling will discourage unapproved settlements and ~~encourage~~ "routine or small third party actions", that ruling should be applauded. The Circuit Court's ruling will also help assure that Congress' overriding goal — that all injured workers receive *at the least* the benefits of the Act — is achieved.

The Act guarantees future medical treatment and remedies for worsening of medical conditions. These benefits are of substantial but future and uncertain value. These benefits are lost whenever unapproved third-party settlement is effected. It is all too easy for claimants and their attorneys to trade the Act's future guarantees for present-day cash. The short-sightedness of human nature needs no further encouragement.

Not only may the requested additional monies encourage possibly ill-considered settlements by those longshoremen who elect to settle third party actions

---

[10] It must be understood that the lien seldom reflects the employee's total compensation entitlement. Instead, most often the lien is only the *temporary* disability payments and medical expenses paid by the employer prior to judgment or settlement. The determination of the amount of the lion's share of the compensation payable — compensation for *permanent* disability — is usually postponed pending the third party litigation. Settlement without the employer's consent terminates future entitlement. Both judgment and settlement with consent leave future rights intact.

without their employer's consent, award of the requested additional amounts will also threaten the delivery of compensation benefits to other workers who (a) either do not possess or do not assert third party entitlement or (b) conclude their third party actions within the Act's framework.

The Act is premised upon the concept of *voluntary* benefit delivery. Petitioner's proposal could threaten that essential premise.

Employers who are forced to watch the dollars Congress mandated they pay to employees ultimately end in the hands of attorneys may take all lawful efforts to assure that this perceived misallocation is minimized. The misallocation of funds can be minimized only by restricting the ultimate lien to the lowest possible level. The lien amount can be restricted only by lowering (by more frequent contest) the amounts of compensation or medical benefits delivered to the workers on a voluntary basis.

Any lessening of the incentives for prompt and voluntary payments will harm the majority of injured workers who elect to stay within the Act's ambit and benefit only the minority (and their attorneys) who resolve third party actions without their employer's consent.

The Circuit Court's Ruling Creates No Anomaly In Comparison With Other Compensation Laws.

The primary position advanced by the plaintiffs' bar appears to be that a denial of additional amounts

would be contrary to the overwhelming weight of authority in "nearly all of the heavily industrialized states."[11] The position is incorrect.

Most states *do* provide some form of fee apportionment in third party actions brought by compensation recipients. This Act also provides a similar system for those third party actions which proceed to judgment or settlement *with* the employer's written consent. Under this Act, all costs of the third party action are deducted before determining the amount of the employee's further compensation entitlement. See 33 USC §933(f) and (g). This automatically assures "apportionment."

Thus, whenever the *gross* third party recovery obtained from the shipowner through judgment or approved settlement is less than the employee's total compensation entitlement (including the amounts paid prior to the date of the third party settlement and the value of future entitlement as determined by the Secretary of Labor), *all* expenses of the third party litigation — including all attorneys' fees — are effectively paid by the employer.

Assuming that the contingent fee agreement entered into between the injured worker and his attorney calls for a one-third fee, the fees are shared between 100% and 150%, and it is only when the *gross* proceeds of the third party action closed by judgment or approved settlement exceed 150% of the compensation

---

[11] Brief of Amicus Association of American Trial Lawyers, pp. 3-12.

entitlement (again, as determined by the Secretary of Labor) that the employee bears the full cost of the litigation. At that point, *only* the employee benefits from each incremental settlement or judgment dollar.

It is readily apparent that the stevedore does share in the total costs of providing recompense for the injury until that point where the shipowner's agreed or adjudged liability equals at least 150% of the worker's total compensation entitlement.

As interpreted by the Second Circuit, the only injured employee not receiving a *very* substantial recovery[12] required to pay his own costs of litigation is the worker who undertakes settlement without first obtaining his employer's formal written consent.

In a sense, the Second Circuit's decision requires Mr. Bloomer to pay a penalty — or, at the least, to be treated differently — for his decision to settle without his employer's consent. Some states impose a much

---

[12] For example, if a 40-year old full-time longshoreman earning the average West Coast wage of $26,443 (1978) sustains a back strain sufficient to support a 10% permanent partial disability award (an exceedingly common "rating") the discounted (at 6%) "present value" of his award approximates $25,000 — payable in addition to his temporary disability and medical care benefits.

Assuming that the worker remained off work for four months and incurred medical bills of $500, the total value of his compensation entitlement exceeds $31,000.

Further assuming a 33-1/3% contingent attorney's fee agreement, the worker would pay all of his own fees only if the judgment or approved settlement exceeded $46,500. A large number of third party actions involving similar facts and divergent assessments of fault would, if tried, result in judgments substantially below the compensation valuation.

more severe penalty for that decision — the compromise with the third party is void unless made with the employer's approval.[13]

CONCLUSION

One of the earliest decisions considering the question here presented is *Fontana* v. *Pennsylvania R.R.*, 106 F. Supp. 461, aff'd. *sub nom Fontana* v. *Grace Lines, Inc.*, 205 F.2d 151 (2nd Cir. 1953), cert. den. 346 U.S. 866 (1953),[14] (issued prior to *Ryan, supra*, and, therefore, at a time when longshoreman and stevedore possessed a "common" interest in the third party recovery).

In that decision, the Second Circuit found no reason for distinguishing third party actions brought by the stevedore from those brought by the longshoreman, recognized a commonality of interest in the third party recovery, and (in accordance with the "common fund" doctrine) charged the costs of obtaining the recovery against the "fund" itself.

---

[13] See, for example, Oregon's provision:
"Any compromise by the worker or other beneficiaries or the legal representative of the deceased worker of any right of action against an employer or third party is void unless made with the written approval of the paying agency or, in the event of a dispute between the parties, an order of the board. . . ." (ORS 656.587)

[14] In this decision, as in all others considering the question, there is no mention of what this Amicus believes is a very significant factor — the distinction between judgments and approved settlements, on the one hand, and "unapproved" settlements, on the other. The distinction exists and should be recognized; it was struck by Congress as part of a comprehensive compensation system.

There *is* no reasonable basis for distinguishing actions brought by the employer from those brought by the employee *and* settled with the employer's consent or taken to judgment because, in both cases, the interests of the employer, the employee, *and* the Act coalesce.

Where, however, the settlement is concluded without the employer's consent, the interests of the employer and the employee (however "common" they may be) diverge from those public interests reflected by Congress and this Act. The Second Circuit's ruling satisfies those public interests by assuring that the maximum possible amounts remain available for redistribuition to other injured workers.

The Secretary's procedure for determining the "deficiency exposure" potential present in every third party judgment and approved settlement case echoes the procedure outlined at 33 USC §933(e) (the statutory allocation formula for *assigned* third party actions) in every respect but one. Perhaps recognizing a need for contingent fees in cases brought by the employee, the Secretary deducts the *full* fee agreed to by the employee in determining the deficiency exposure facing the stevedore but controls the amount of the fee deductible in determining the amount payable to the employee out of the proceeds of an *assigned* third party action.

Had Mr. Bloomer settled his action with approval, the proceeds would have been distributed as follows:

Recovery	$60,000.00
Less Fees and Expenses:	(20,135.20)
Balance:	$39,864.80
Less Lien:	(17,152.83)
Net to Mr. Bloomer:	$22,711.97[15]

The stevedore would have received a "credit" against its future compensation liability in the amount of the "net". Mr. Bloomer would have remained entitled to all further benefits, commencing when the "credit" was exhausted. By electing a procedure which both continued his compensation entitlement and assured full lien repayment, Mr. Bloomer would have paid a price — the costs of the litigation — for his continued benefits.

At trial below, however, Mr. Bloomer elected to step outside the Act's protective framework and give up his future benefits by settling without his employer's consent. He was undoubtedly advised that the chosen procedure foreclosed all further recovery for his injury. He must have viewed the amount he has already received as sufficient recompense for *both* his third party action *and* his remaining compensation entitlement.

Now Mr. Bloomer seeks to gain additional amounts from his employer's compensation carrier. In short, he seeks a reward for stepping outside Congress' framework. His attempt should be rejected. The availability of an additional source for third party recoveries will

---

[15] This is the same amount actually received by Mr. Bloomer in accordance with the Second Circuit's ruling.

only encourage marginal litigation and increase the numbers of cases settled outside the Act.

Any unfairness to Mr. Bloomer inherent in the allocation system approved by the Circuit Court could have been resolved by excluding the lien amounts from the base "recovery" used for computing the amount of Mr. Bloomer's attorneys' fees. That procedure would have achieved the following distribution:

Recovery:	$60,000.00
Less Fees and Expenses:	(14,484.97[16]
Balance for Distribution:	$45,515.03
Less Lien:	(17,152.83)
Net to Mr. Bloomer:	$28,362.20

If distributed in the manner above, (a) Mr. Bloomer would receive almost exactly what he seeks here, (b) his attorney would receive exactly what he contracted for — one-third of the amount attributable to his skills and effort, *and* (c) the stevedore's funds would be fully repaid and available for delivery to other injured workers.

---

[16] Computed at 33-1/3% of the amount gained by the litigation — the difference between the gross recovery and the amounts previously paid pursuant to the Act.

The distribution here suggested by this Amicus is consistent with the policies underlying all compensation systems and reflected in the 1972 amendments to this Act. Perhaps more importantly, it is fair.

Respectfully Submitted,

Dennis Lindsay
Robert Babcock
1331 S. W. Broadway
Portland, Oregon 97201
503-226-1191

Lindsay, Nahstoll, Hart,
Neil & Weigler
Of Counsel

CERTIFICATE OF SERVICE

This is to certify that on the 24th day of August, 1979, copies of this Brief were served on:

Alan C. Rassner, Esq.
Rassner, Rassner & Olman
Counsel to Petitioner
15 Park Row
New York, New York 10038

Douglas A. Boeckmann, Esq.
Semel, McLaughlin & Boeckmann
Counsel to Respondent
10 Rockefeller Plaza
New York, New York 10020

Paul S. Edelman, Esq.
Counsel for Amicus Curiae Association of Trial Lawyers of America
99 Park Avenue
New York, New York 10016

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1418

WILLIAM E. BLOOMER, JR.,
Petitioner,

—against—

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,
Respondent.

MOTION OF HUDSON WATERWAYS CORPORATION, COVE SHIPPING INC., SEA TRAIN LINES, INC., APEX MARINE CORP., MOORE McCORMACK LINE, INC., AND UNITED STATES LINES, INC., FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* SUGGESTING THE EXISTENCE OF A VITAL ISSUE TO BE RESERVED FOR A FUTURE, PROPER CASE.

HOLLIS M. WALKER, JR.
Attorney for Amici Curiae Hudson Waterways Corporation, Cove Shipping, Inc., Sea Train Lines, Inc., Apex Marine Corp., Moore McCormack Line, Inc., and United States Lines, Inc.
40 Wall Street
New York, New York 10005
(212) 344-4700

JOSEPH T. STEARNS,
WALKER & CORSA
of Counsel

TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1418

WILLIAM E. BLOOMER, JR.,

Petitioner,

—against—

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,

Respondent.

MOTION OF HUDSON WATERWAYS CORPORATION, COVE SHIPPING INC., SEA TRAIN LINES, INC., APEX MARINE CORP., MOORE McCORMACK LINE, INC., AND UNITED STATES LINES, INC., FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* SUGGESTING THE EXISTENCE OF A VITAL ISSUE TO BE RESERVED FOR A FUTURE, PROPER CASE.

To the Justices of the Supreme Court of the United States:

Pursuant to Rule 42 of the Rules of the Supreme Court, Hudson Waterways Corporation, Cove Shipping Inc., Sea Train Lines, Inc., Apex Marine Corp., Moore McCormack Line, Inc., and United States Lines, Inc., hereby move for leave to file as amici curiae the accompanying brief in the above captioned proceeding. Consent to the filing of the brief has been withheld by counsel for William E. Bloomer, Jr.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae consist of individual American steamship companies whose operations are nationwide. They are believed to be representative of American and foreign steamship companies which conduct business in the United States and which are thereby subject to personal injury suits by waterfront workmen brought by virtue of § 905 (b) of the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 901 *et seq.*

Through the annexed brief, amici curiae seek to inform this Court that there exists a vital issue concerning an alleged "lien" which is commonly thought to exist in every case in favor of stevedoring companies over the proceeds of suits brought by compensated longshoremen in "third-party" actions against shipowners. Clearly, the issue of the existence of this "lien" in all circumstances is not before the Court in this proceeding. Rather, the Court is being asked to address itself to the narrower question whether, in the event that a stevedore (or its insurer) *is conceded to be* entitled to recover its compensation liability, some portion of the cost of the legal proceeding necessary to effect this recapture should be borne by the stevedore.

In dealing with what is essentially a question of apportionment of the proceeds of petitioner's recovery against the shipowner, the Court may, in our respectful submission, mistakenly view the larger issue of the existence and nature of the so-called "lien" to be an essential preliminary consideration. The purpose of intervention by amici curiae in this proceeding is to suggest that this Court refrain from commenting upon the entitlement of stevedoring companies to the so-called "lien" in all cases, particularly those which involve issue of concurrent stevedore negligence, and that it limit its discussion to the particular facts in this proceeding in which no such issue was raised.

Amici curiae, as well as all vessel owners similarly situated, are vitally interested in ensuring that any "lien" right permitting stevedoring companies to recover the amounts which they have paid to their employees in compensation under § 907 and § 914 of the Act not be extended to those situations in which the stevedoring companies have themselves contributed to the injury of the longshoremen by their negligence. Amici curiae believe that their position on this issue will be sustained when it is raised in a future and proper case. In this proceeding, in which the interests of injured longshoremen, the plaintiffs' bar and stevedoring companies are alone represented, all parties before the Court and those heretofore amici curiae *assume* the existence of the unqualified "lien" right of a negligent stevedoring company to recoup its compensation liability depending only on proof of some shipowner negligence and the amount of the verdict. The annexed brief is offered, then, to afford this Court an opportunity to consider a perspective on this vital issue which has not been and will not be presented by any of the other participants in this proceeding.

In offering this brief, amici curiae are truly responding as "friends of the court" as that role has been defined in Black's Law Dictionary, 4th edition, 1951:

> *AMICUS CURIAE*
>
> A bystander (usually a counsellor) who interposes and volunteers information upon some matter of law in regard to which the judge is doubtful or mistaken, *Fort Worth & D.C. Railway Co.* v. *Great House,* Tex. Civ. App., 41 S.W.2d 418, 422; or upon a matter of which the court may take judicial cognizance. *The Claveresk,* CCANY, 264 F. 276, 279; *In Re Perry,* 83 Ind. App., 456, 148 N.E. 163, 165. Implies friendly intervention of counsel to remind court of legal matter which has escaped its notice, and regarding which it appears to be in danger of going wrong. *Blanchard* v. *Boston & M.R.,* 86 N.E. 263, 167 A. 158, 160.

The nature of the intervention of amici curiae in this proceeding is such that the annexed brief does not and cannot support the position taken by either of the party litigants. Since an amicus curiae participates only for the benefit of the Court, it is not necessary that its position represent the views or interests of the litigants. *Alexander* v. *Hall,* 64 F.R.D. 152 (D.SC., Columbia Division, 1974).

Amici curiae wish to make it perfectly clear that they do not seek, nor would it be proper to do so, to raise for this Court's *determination* an issue which has concededly not been raised or supported by the parties herein. Rather, well aware that the issue of a negligent stevedore company's entitlement to participate in a longshoreman's recovery against a shipowner can only be resolved on facts which are not present here (i.e. a finding of negligence on the part of the stevedore employer), amici curiae merely seek to alert the Court to the *existence* of that issue in order that it may be reserved for consideration in a future and proper case.

Accordingly, amici curiae respectfully request leave to file the annexed brief.

Dated: New York, New York
November 30, 1979

Respectfully submitted,

HOLLIS M. WALKER, JR.
Attorney for Amici Curiae Hudson Waterways Corporation, Cove Shipping, Inc., Sea Train Lines, Inc., Apex Marine Corp., Moore McCormack Line, Inc., and United States Lines, Inc.
40 Wall Street
New York, New York 10005
(212) 344-4700

JOSEPH T. STEARNS,
WALKER & CORSA
of Counsel

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1418

WILLIAM E. BLOOMER, JR.,
Petitioner,

—against—

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,
Respondent.

BRIEF OF AMICI CURIAE HUDSON WATERWAYS CORPORATION, COVE SHIPPING INC., SEA TRAIN LINES, INC., APEX MARINE CORP., MOORE McCORMACK LINE, INC., AND UNITED STATES LINES, INC., SUGGESTING THE EXISTENCE OF A VITAL ISSUE TO BE RESERVED FOR A FUTURE, PROPER CASE.

HOLLIS M. WALKER, JR.
Attorney for Amici Curiae Hudson Waterways Corporation, Cove Shipping, Inc., Sea Train Lines, Inc., Apex Marine Corp., Moore McCormack Line, Inc., and United States Lines, Inc.
40 Wall Street
New York, New York 10005
(212) 344-4700

JOSEPH T. STEARNS,
WALKER & CORSA
of Counsel

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1418

WILLIAM E. BLOOMER, JR.,

Petitioner,

—against—

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,

Respondent.

BRIEF OF AMICI CURIAE SUGGESTING THE EXISTENCE OF A VITAL ISSUE TO BE RESERVED AND DETERMINED BY THE COURT IN A FUTURE, PROPER CASE.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae consist of individual American shipowning companies whose vessels are potentially the site of accidental injuries to longshoremen and who are thus subject to suits by such employees of independent contractor stevedoring companies as provided by § 905(b) of the Longshoremens' and Harbor Worker's Compensation Act (33 U.S.C. § 901 *et seq.*). They are "third parties" sueable in accordance with the provisions of § 933 of the Act. It is believed that they are representative of American and foreign shipping companies doing business in the United States who are exposed to suits for personal injuries by waterfront workers and who are vitally interested in an interpretation of the 1972 Amendments to the Longshore-

mens' and Harbor Worker's Compensation Act which achieves the stated goals of Congress.

In this case, the parties and those heretofore amici curiae address a secondary issue of apportionment of the proceeds of a settlement fund, after assuming as a preliminary matter that a stevedore (or, if appropriate, by virtue of § 933(h) of the Act, its workmen's compensation insurer) has a "lien" on the proceeds of a compensated longshoreman's § 905(b) suit against a shipowner.

The interest of amici curiae in this case is only to urge this Court that it would be inappropriate to consider the right of a stevedoring company (or its subrogated workmen's compensation insurer) to recover its compensation liability as if stevedore negligence had contributed to the cause of plaintiff's injuries and as though that fact had been demonstrated. The question presented to this Court by petitioner is whether, in circumstances where the stevedore's freedom from concurrent negligence was conceded, the compensation insurance carrier for the stevedore may recover its entire "lien" from the longshoreman's recovery or whether he must share proportionately in the longshoreman's expense of obtaining that recovery, including plaintiff's attorney's fee.

Any determination of the sharing of the expense of "lien" recapture would, had it been a litigated matter, have necessarily required a determination of the nature of the stevedore's interest in this longshoreman's negligence suit against the shipowner. This case was, however, settled, and the district court held that the nature of this interest was a lien on the proceeds of suit and that this interest was sufficient to support a petition to intervene in order to assure, by court order, that the full amount of the "lien" (i.e. the stevedore's insurer's total cost of benefits paid plaintiff pursuant to §§ 907 and 914 of the Act) would be repaid to it without diminution by any proportionate sharing of the plaintiff's attorney's contingent fee. That is, the shipowner did not resist the claim of "lien" from which fact this Court should infer that petitioner's injuries were caused *only by* ship's negligence.

Indeed, this Court *must* infer only that the "lien" was repaid because the shipowner appreciated that there was no basis in fact for belief that any negligence of the stevedore caused or contributed in any way to the occurrence of injury to plaintiff. For if it were otherwise, because of this Court's decision in *Federal Marine Terminal, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969), the shipowner would have had a defense available to it that proof of stevedore negligence is a complete bar to any direct suit by a compensation-paying stevedore against a third-party shipowner. But Mr. Bloomer's personal injury suit, brought in his name alone, purported to provide a vehicle for recovery by him of his actual damages (i.e. those amounts the trial jury might have determined were owed to him in excess of compensation benefits previously received) and for recovery by the stevedore, through the device of a "lien on proceeds," of its entire compensation expense. Had stevedore negligence been a provable fact in Mr. Bloomer's personal injury suit, the shipowner could have challenged the action, in its latter aspects ("lien on proceeds"), by assertion of a Rule 17 F.R.Civ.P. real party in interest defense or under Rule 19 F.R.Civ.P. by adding the stevedore's insurer as an additional party.

This analysis, however, depends upon two more fundamental considerations which are:

(1) That the law as expressed by this Court in *United States* v. *Aetna Casualty & Surety Co.*, 338 U.S. 366, 381-382 (1949), provides that a workmen's compensation insurance underwriter who pays compensation to an injured employee of an assured succeeds, by payment, to that part

of the employee's claim for damages against an allegedly negligent third-party as "owner" of that cause of action up to the amount of the benefits paid; and

(2) That this Court will not sanction a result by which a negligent stevedore, who declines to sue a shipowner on its *direct* cause of action because of the "no-contribution" rule (which was held to apply to this type action in *Burnside, supra*), can *indirectly* recover against the shipowner merely by encouraging the employee to sue and then asserting that it has an "equitable" lien on the proceeds of suit. To permit such a result would effectively abrogate Rule 17 F.R.Civ.P. with respect to longshoremens' personal injury suits. It must therefore be assumed that, in the instant case, defendant shipowner was aware of but declined to raise a Rule 17 defense *because the stevedore was not negligent.*

Amici curiae wish only to suggest to this Court the existence of a preliminary issue which, if it had been raised, would have been of vital importance to them as well as to the entire maritime industry and to the admiralty bar. This issue is not whether a blameless stevedore should be reimbursed for its compensation costs occasioned by the negligence of a "third party" shipowner. The issue of concern is whether, if (as is typically the case) the stevedore is *also* negligent, the burden of compensation should, in justice, be shifted from what may be an overwhelmingly negligent stevedore to a minimally negligent shipowner. It is this issue which amici curiae urge the court need not and should not decide. This is the issue that should be reserved for determination in a future, proper case.

This brief is submitted out of concern that the Court may indicate in a majority opinion, as did a three justice minority of this Court in *Edmonds* v. *Compagnie Generale Transatlantique,* —— U.S. ——, 99 S. Ct. ——, 61 L. Ed. 2d 521 (1979), that the stevedore's insurer has a right to a

"lien" on the proceeds of a suit instituted by a compensated longshoreman in every case, irrespective of proof of stevedore's negligence.

The three justice minority in *Edmonds* assumed that as a result of the majority holding ". . . the stevedore, who, the jury determined, was 70% at fault, will recoup its statutory compensation payments out of the damages payable to Edmonds and thus will go scot-free" (at p. 536, footnote 1) and that "[u]nder the judicially created lien sanctioned by the Court's opinion" the stevedore's insurance company would recover its incurred compensation benefits of at least $49,152.00 out of the $90,000.00 damages awarded.

But this Court's holding *did not* decide that a negligent stevedore would, indeed, go "scot-free" as the issue was not before the Court. The shipowner in *Edmonds,* as in the instant case, did not join the stevedore as a Rule 19 F.R.Civ.P. party and the "determination" of 70% stevedore negligence by the jury was reached at a trial in which the stevedore did not participate. The *Edmonds* record surely demonstrates that the single issue before the Court was whether the shipowner could reduce its liability for plaintiff's "damages"[1] by the percentage of negligence contributed by the stevedore to the plaintiff's injury. The issue of whether an *assumed* negligent stevedore was entitled to recover the "lien" was, and, amici curiae believe, still is an undecided one; it can be decided only *after* the fact of stevedore negligence has been established by yet another jury at a trial in which the stevedore is a joined party. See

1. Hence, the "damages" of plaintiff with which the Court should be understood to have been concerned was the amount of the jury award *in excess of* compensation previously paid. There can be no double recovery by a longshoreman of both the total amount of a jury award and compensation. This distinction was lost because the shipowner conceded a right to double recovery, but only to the extent that the recovery of "damages" would be an additional amount representing only the shipowner's negligence.

Edmonds v. *Compagnie Generale Transatlantique,* 577 F.2d 1153 (at p. 1156), rev'd, *supra.*

Indeed, far from affirming the existence of a "lien" in all cases the *Edmonds* majority indicated, with respect to the vital question of the rights of a stevedore's insurer in a case where a stevedore contributes negligently to the cause of a longshoreman's accident, only that "if [the stevedore] has lien rights in the longshoreman's recovery it may be out-of-pocket even less" (at pp. 532-533). Further, the majority opinion distinguished a suit brought by a stevedore pursuant to a § 933(b) assignment from a suit brought by the individual longshoreman within six months of acceptance of an "award" of compensation, stating (at p. 533) that, in the latter instance, a "corresponding judicially-created lien in the employer's favor operates where the longshoreman himself sues."[2]

The entire purpose and extent of the interest of amici curiae is to attempt to pursuade the Court that it need not and should not suggest that it is appropriate for the district courts to determine the relative rights of the parties interested in a typical longshoreman's personal injury action in a way which entitles a negligent stevedore to avoid its compensation liability depending only on whether some shipowner negligence can be proven. In short, it is submitted that the stevedore's "lien" in such circumstances (in any case in which stevedore negligence is proven) does *not* exist, and, accordingly, the shocking inequity of what this Court's *Edmonds'* minority thought would result from the majority's refusal to visit the effect of concurrent stevedore negligence on an innocent longshoreman need not be.

Edmonds did hold that this Court will not retroactively alter what was understood to be the law because to do so

2. The Court cited *The Etna,* 138 F.2d 37 (3d Cir. 1943). Amici curiae assert that this case was tacitly overruled by *Federal Marine Terminals, Inc.* v. *Burnside, supra.*

would distort the delicate balance effected by Congress. This means that the question of a negligent stevedore's right to recover its compensation expenses must be determined by reference to the law expressed by this Court *before* 1972, by changes in the statute enacted prior to that time or by considerations of congressional purpose in enacting the 1972 amendments. What follows assumes this fact, as well as this Court's continuing commitment to a belief that whatever inequities result as between a shipowner and stevedore, the interest of the injured longshoreman is paramount and that whatever inevitable inequity exists in the present statutory scheme, *if any,* it will not find as its victim the injured longshoreman.

Amici curiae do *not* claim that the writ of certiorari in this proceeding was improvidently granted nor that for any other reason this Court is without power to determine the question presented. To the contrary, amici curiae urge that the question be decided and seek to present no argument whatsoever for or against the proposition that plaintiff's attorney is or is not entitled to ask a fee from the compensation underwriter for vindicating the right of this blameless stevedore who, *because* blameless, was and is enitled to be fully reimbursed by this negligent shipowner for all compensation expenses it incurred or for such sum as remains after deduction of an appropriate fee.

DISCUSSION OF THE VITAL ISSUE TO BE RESERVED AND DETERMINED BY THE COURT IN A FUTURE, PROPER CASE, TO WIT: A "LIEN" ON PROCEEDS DOES NOT EXIST IN FAVOR OF A NEGLIGENT STEVEDORE.

Evaluation of the vital issue suggested by amici curiae requires review of decisions by this Court and courts of inferior jurisdiction over the twenty-seven years between this Court's decisions in *American Stevedores* v. *Porello,* 330 U.S. 446 (1947), and *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.,* 417 U.S. 106 (1974).

As the Court is aware, the 1972 amendments to the Act repealed this Court's decision in *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85 (1946), and *Ryan Stevedoring* v. *Pan Atlantic S.S. Corp.,* 350 U.S. 124 (1956), by providing in § 905(b) that (1) a person entitled to compensation and "anyone else otherwise entitled" may sue the shipowner and recover for negligence only and (2) that in no event shall the stevedore be liable for "such damages directly or indirectly." Hence plaintiff cannot recover for unseaworthiness (*Sieracki*) and the shipowner cannot recover indemnity from the stevedore (*Ryan*). But what of the obvious interest of the stevedore or its compensation insurer in the amount of compensation paid to plaintiff as a result of the accident in suit?

Since the 1972 amendments, stevedore companies claim that upon proof to a jury's satisfaction of even trivial negligence on the part of the shipowner, plaintiff recovers his full damages solely from the shipowner, from which sum the stevedore must be reimbursed for all or a part, depending only on the size of the verdict, of its compensation liability through assertion of a so-called lien on the proceeds of plaintiff's suit. This "lien" is said, on one hand, to be "equitable" and, on the other, to be wholly unaffected by proof of stevedore negligence in bringing about the injury for which the longshoreman has successfully sued the shipowner. This resolution, sanctioned by numerous courts of both trial and appellate jurisdiction but not yet by this Court since the 1972 amendments, can be readily seen as both unfair and unworkable and has been so acknowledged by virtually every court which has sanctioned it.

In the view of amici curiae, the problem is in the perpetuation of the concept that the stevedore has an *unrestricted* right to recover compensation expenses depending solely upon proof of shipowner negligence. The solution is to

achieve an interpretation of the amendments treating the stevedore's interest as a "claim" or "cause of action" against the shipowner, which is subject to defeat by proof of stevedore negligence causing the injuries in suit—this because no other scheme of loss apportionment between shipowner, stevedore and individual longshoreman can be sanctioned by this Court in light of the expression of Congress's will in enacting the 1972 Amendments.

The other arguments which were offered and rejected are:

(1) that the shipowner may claim a right to a *pro rata* or, in the uncomplicated case, a one-half reduction in its liability to the longshoremen on the basis of the so-called "Murray Credit." See *Lucas* v. *"Brinknes" Schiffahrts Ges. Franz Lange G.M.B.H. & Co.,* 379 F. Supp. 759, 387 F. Supp. 440 (E.D.Pa. 1974).

(2) that the shipowner may claim that it is not liable to the longshoremen for the degree of fault of the stevedore along lines urged without success in *Shellman* v. *United States Lines, Inc.,* 528 F.2d 675 (9th Cir. 1975), *cert. denied,* 425 U.S. 936 (1975).

(3) that the shipowner may claim that it is not liable to the longshoreman for the degree of fault of the stevedore, and concede, in order to make unnecessary the joinder of the stevedore in the longshoreman's suit, that the employee is entitled to a "double recovery" to include complete compensation and that part of his damages attributable to the shipowner's fault alone (*Edmonds* v. *Compagnie Generale Transatlantique, supra*).

All of these approaches lack consistent justification since they do not necessarily effect a complete and fair resolution as between stevedore and shipowner, and more importantly, because they might reduce the verdict in favor of a longshoreman on the basis of the negligence of co-employees over whom the longshoreman has no control.

Shellman, supra, was, of course, essentially a more sophisticated "Murray Credit" which sought to reduce the shipowner's liability to plaintiff depending only on the basis of the number of parties (stevedore and shipowner) negligent with respect to plaintiff in causing the injury sued for while *Shellman* sought reduction to the *degree* of the stevedores' negligence. But if one thing is clear from the history of the interpretation of the Longshoremens' and Harbor Worker's Compensation Act in the last 30 years, it is that the Supreme Court considers the interests of the individual longshoreman to be paramount and that if any interpretation of the Act is to be "unfair" to any of the three parties interested, it will not be along lines "unfair" to the plaintiff longshoreman. Reduction of a longshoreman's recovery on the basis of anyone's negligence other than his own is clearly a resolution unacceptable to this Court.

However, on two occasions, in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. 282 (1952), and *Pope & Talbot* v. *Hawn,* 346 U.S. 406 (1953), this Court rejected a resolution of the continuing problem on the basis of limiting the stevedore's "contribution" to its compensation liability and specifically endorsed a result which required a negligent shipowner to repay to a negligent stevedore the amount of the latter's incurred compensation liability, despite argument that to do so was unfair. Obviously an argument which posits that a negligent stevedore cannot recover its "lien" can only succeed if *Halcyon* and *Pope & Talbot* can be distinguished, mindful of the 1974 endorsement (*Cooper, supra*) of the *Halcyon* rule of no contribution between joint tortfeasors in situations where the Act is a factor. This we believe can successfully be done if the following analysis of the development of the law in this area is borne in mind.

The Act was adopted in 1927 and was based on the New York State Workmen's Compensation Act. In respect of

rights against "third parties," § 933(a) originally provided for an employee's election between compensation and suit against a negligent third party. In event of an election to accept compensation, § 933(b) provided that the employee's cause of action was assigned to the employer upon payment of compensation, and the employer could then start suit or compromise with the third party (§ 933(d)) and deduct from the proceeds of suit incurred compensation liability before paying the balance of any verdict obtained in the assigned cause of action to the injured employee (§ 933(e)).

In 1938, however, the Act was amended to provide for an assignment of the employee's cause of action *only* upon payment of compensation pursuant to an *award.* Pursuant to § 914 of the Act, compensation payments are to be made voluntarily by the employer, failing which the Board is empowered to order the employer to pay compensation to its injured employee. But this order was an "award" of compensation, and payments thereunder resulted in assignment of the employee's cause of action to the employer.

Shortly thereafter, a longshoreman received voluntary payments under the Act from his employer and successfully sued the shipowne . He then announced his intention not to repay his employer that portion of the verdict representing compensation received by him, claiming that the 1938 amendment to § 933(b) was intended to give him both compensation and damages. The shipowner, not knowing whom to pay, deposited the amount of the verdict in court, and the stevedore intervened to protect its interest in the proceeding.

These were the facts of *The Etna, supra,* in which it was held that the amendment was not designed to give the employee double recovery of both compensation and damages, about which there now can be no argument. But because the 1938 amendment was interpreted as providing for an assignment only following an award and therefore as de-

priving the stevedore/employer of its right to sue the shipowner directly where payments had been voluntarily made (and no doubt to encourage employers to continue to do so), the Court held that the employer/stevedore was entitled to a lien on the proceeds of the plaintiff's suit.

The lien may thus properly be considered "equitable" perhaps only because it was a classic expression of the function of Chancery, whereby a remedy in equity was created because the employer had no adequate remedy at law. It is clear that the stevedore's lien was characterized as equitable in this sense of the word *only*. Neither the court in *The Etna* nor the Second Circuit Court of Appeals in *Fontana* v. *Pennsylvania R.R. Co.*, 205 F.2d 151 (2 Cir. 1953) (affirming 106 F. Supp. 461, which reached the same result and which expressly linked the "lien" to the stevedore's inability to sue the shipowner) considered the question of the affect of employer negligence upon "lien" recovery.

The law establishing the stevedore's right to recover out of the proceeds of a "third party" action is wholly of judicial creation. It was (1) *required* by considerations of policy resulting from the awkward drafting of the 1938 amendments to § 933(b) of the Act (52 Stat. 1168) and (2) was the product of the belief by the courts that § 933(b) of the Act, as amended in 1938, had "cut off" the stevedore's right to sue the shipowner as assignee of the employee's right against the "third party" shipowner if compensation was paid voluntarily and not pursuant to an award.

But in *Federal Marine Terminal Inc.* v. *Burnside Shipping Co., supra,* this Court later held that § 933(b) *did not* "cut off" a stevedore's right to sue a negligent shipowner for the full amount of its damages. In that case, which involved claim of a longshoreman's wrongful death, a stevedore was allowed to sue the shipowner to recover its total compensation *exposure* despite there having been no

assignment of plaintiff's cause of action because compensation had either been paid without an award or had been paid pursuant to an award but plaintiff had sued thereafter in her own right within six months.[3]

Burnside, supra, thus made untenable the proposition advanced in *The Etna, supra,* that a stevedore was entitled to an equitable lien because deprived of a remedy at law. The significance of this Court's *Burnside* decision is best demonstrated by the decision of the Circuit Court of Appeals for the District of Columbia in the case of *Joyner* v. *F & B Enterprises Inc.*, 448 F.2d 1185 (D.C. Cir. 1971).

In *Joyner,* the Court of Appeals acknowledged that the district court decision granting the compensation insurer Rule 19 status would have been correct had it not been for the unique effect of § 933(b) which, it said, operated to "cut off" the employer's right to sue. Hence, joinder was improper since the employer's remedy was solely a lien on proceeds. But the Court of Appeals acted in apparent total ignorance of this Court's *Burnside* opinion which clearly invalidated this rationalization. Interestingly, the Court of Appeals relied on *Pope & Talbot* which, in turn, is based on *Halcyon,* which this Court in 1974 said in *Cooper* "was and still is good law on its facts." But the "facts" of both *Halcyon* and *Pope & Talbot* have changed; the Act, and particularly § 933(b) which these cases interpreted, was later amended not (at least significantly) in 1972 but in 1959!

---

3. An amendment to § 933(b) in 1959 further conditioned the employer's right to obtain an employee's cause of action by assignment by allowing the employee to retain his right to sue even when paid compensation pursuant to an award, if he brought suit within six months of the date of the award. As will be demonstrated, *infra,* the *1959* amendments completely undermined the policy considerations which motivated this Court's decision in *Halcyon* and *Pope & Talbot, supra.*

We have seen that it was erroneously decided very early on that the 1938 amendment to § 933(b) "cut off" the stevedore's right to sue the shipowner. What was then still to be considered was the impact following from the shipowner's right to sue the stevedore, first for contribution and after the 1956 *Ryan* decision for indemnity, on the "third party" rights of the individual longshoreman. This now reaches the issue of the policy considerations underlying the decisions of this Court in *Halcyon* and *Pope & Talbot*. The decision of the Third Circuit Court of Appeals in *The Etna, supra,* was concerned only with (a) denying the longshoreman a double recovery because of the supposed effect of the 1938 § 933(b) amendment and (b) providing to the stevedore, where no issue was raised of its concurrent negligence, a basis for recovery of its incurred compensation liability.

Notwithstanding (as *Burnside, supra,* later made clear) that *The Etna* court's view of the stevedore's inability to sue was incorrect in law decisions of this Court thereafter apparently adopted *The Etna* result, i.e. accorded a "lien" in the stevedore's favor over the proceeds of a longshoreman's suit. Moreover, this grant of a most extraordinary right of a lien on proceeds was extended in *Halcyon* and *Pope & Talbot, supra,* so as to include situations where stevedore negligence had been demonstrated. The basis of these decisions was, however, not that it was *appropriate* to so prefer the right of the stevedore to that of the shipowner but that it was *required* as the only alternative available which would guarantee that a longshoreman would retain right to claim compensation *and* sue for damages in a third party action against a shipowner which this Court clearly realized could be a result achieved only if the stevedore employer was assured, in all instances, of the repayment of its entire compensation obligation.

The initial expression of this Court's appreciation of the awkwardness of the 1938 amendment to § 933(b) is found in *American Stevedores* v. *Porello,* 330 U.S. 447 (1947). This Court there considered a case in which a shipowner (the United States), sued by a longshoreman who had been paid compensation without an award, joined the employing stevedore as a third party defendant seeking indemnity and/or contribution under the stevedoring contract in force at the time of plaintiff's injury. The stevedore moved to dismiss the plaintiff's cause of action, claiming that suit was barred by § 933(a), the election provision of the Act, merely by virtue of the longshoreman's acceptance of compensation without an award, as had been the case prior to 1938, despite the amendment limiting assignment of plaintiff's cause of action to instances where the compensation had been paid pursuant to an award. The Court solved this problem, created by Congress' failure to amend the statute, in a fashion achieving harmony between § 933(a) and (b), by preferring § 933(b) and by deciding that Congress intended to expand the employee's rights to give him both compensation and a suit for damages, thus beginning a yet unbroken string of decisions which in result always prefer the interests of the employee to those of the shipowner or stevedore.

The Court justified its result on the basis of the intention of Congress and on the following flaw in the argument made by the stevedore in seeking to bar its employee's suit. If mere acceptance of compensation barred suit by virtue of § 933(a) despite the 1938 amendment, *neither* the employee *nor* the employer could sue if compensation had been paid without an award. The former because he had elected compensation, the latter because on the facts of the case (i.e. there being no award) no assignment of the employee's cause of action against the shipowner had taken place. Thus a *blameless* stevedore, in no way responsible for the acci-

dent in suit, would lose its ability to recover its compensation payments to its employee unless it "forced an award" and obtained an assignment. Encouraging the employer to force an award by simply refusing in the first instance to pay compensation voluntarily was, however, clearly seen as undesirable as it would have required employers not to comply with § 914 of the Act regarding voluntary payments, and it would have deprived the employee of control over his suit against the shipowner.

In other aspects of its opinion, the *Porello* Court seemed to indicate that contribution from a negligent stevedore might be available to a shipowner. (See, e.g., *In Re Seaboard Shipping Corp.*, 449 F.2d 132 (2nd Cir. 1971)). But in 1947 the Court did not clearly perceive the effect of the shipowner's right to recover contribution from a negligent stevedore on the now firmly established and always thereafter paramount right of the employee to receive voluntary compensation without loss of his right to sue. This recognition came in 1952 in the Court's *Halcyon* decision which purportedly barred contribution among joint tortfeasors in any maritime case except one involving collision.

In the District Court in *Bacille* v. *Halcyon Lines,* 89 F. Supp. 765 (E.D.Pa. 1950) (what became the *Halcyon, supra*) the jury was required to determine the proportionate fault of shipowner and stevedore, whom the shipowner had been allowed to join in a suit for contribution by virtue of *Porello*. The jury believed the stevedore 75% to blame and the shipowner 25%, but the court entered judgment for plaintiff's verdict against both ship and stevedore on a 50-50 basis. Of course, the stevedore was allowed a credit for its compensation payments. In result, however, this meant that the party with an ability to "force an award" was to bear an equal portion of plaintiff's jury award. But this was a result it could avoid by "forcing an

award" and collusively settling with the shipowner by virtue of § 933(d) for far less than plaintiff's full damages and then deducting from the proceeds accrued compensation payments as was permitted by § 933(e).

The Court of Appeals, however, in *Baccille* v. *Halcyon Lines,* 187 F.2d 403 (3 Cir. 1951), rev'd, 342 U.S. 282 (1952), recognized the danger of allowing contribution from the stevedore/employer and decided to reduce the stevedore's incentive to exploit the obvious flaw in § 933(b) by holding that the shipowner was entitled to contribution, but only up to the amount of the stevedore's compensation liability. But the amount of this liability was necessarily "uncertain," as was recognized by this Court, because the employee could not have his *full* entitlement to compensation determined without action by the Compensation Board resulting in an "award." That is, in case of dispute over entitlement to further compensation between employer and employee, the Board would, by awarding further payments, cause an assignment. Obviously, as § 933(b) read in 1952, a negligent stevedore faced with the prospect of being sued for contribution had an interest in either refusing to pay compensation at all and obtaining an assignment if the longshoreman pursued his compensation remedy or unfairly trying to limit their payments by threat of forcing an award and obtaining an assignment.

This Court in *Halcyon* rejected the resolution thought expedient by the Court of Appeals as not a *sufficient* guarantee of assuring the longshoreman freedom from interference by his employer in his third party action. This Court held that plaintiff's judgment against the shipowner could not be reduced even by the amount of compensation liability and that the shipowner must repay to a negligent stevedore the amount of incurred compensation, as the Court later precisely ruled in *Pope & Talbot, supra.* The § 933(b) problem was thus resolved in a way "fair" to the

employee—but to him *only*. The result which this Court deliberately and as a matter of policy sought to achieve was to wholly insulate the stevedore employer, not out of any conviction that it was "fair" to do so or motive to prefer the interest of the stevedore to that of the shipowner, but out of concern for effective preservation of the longshoreman's dual right to voluntary compensation and to maintain a third party cause of action for damages which the *Porello* Court said had been established by the 1938 amendments.

Halcyon can thus be seen in light of its "facts" as little more than the reaction of the Court to the peril to the *employee's* rights raised by giving the shipowner a right to contribution from the stevedore. It can arguably be seen perhaps as solely the product of flaws in the 1938 amendment to § 933(b). But in 1974 in *Cooper* the Court itself criticized the occasional breadth of its (*Halcyon*) dictum and, consistent with *Cooper,* in 1975 in *United States* v. *Reliable Transfer,* 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975), it restricted the application of the *Halcyon* rule of no contribution between joint tortfeasors to situations where the parties are "shielded by" the Act.

Of course the *Ryan* right of indemnity also imperiled the longshoreman's "third party" rights because indemnity, like contribution, gave the stevedore a motive to assume control of the suit to avoid its obligation to pay plaintiff's full damages imposed through breach of its newly found obligation to perform stevedoring services in a workmanlike manner. This time, however, this Court, perhaps tired of the continuation of a manifestly unjust result as between shipowner and stevedore, solved the ensuing problem arising from the stevedore's ability to "force an award" (of which Mr. Justice Black, the author of the court's *Halcyon* and *Pope & Talbot* decisions, spoke so forcefully in his dissent in *Ryan, supra*) in an entirely different manner.

On October 24, 1955, fourteen days after hearing argument in *Ryan*, this Court granted certiorari (350 U.S. 872) in *Czaplicki* v. *The Hoegh Silvercloud* and held, at 351 U.S. 525 (1956), that by virtue of the *Ryan* right of indemnity, raising the possibility of ultimate stevedore liability, the assignment provision of § 933(b) could no longer apply. Why? Because it was not *fair* to the employee to allow the stevedore to "force an award" and obtain control of his suit, which Justice Black said in his *Ryan* dissent it would do in order to avoid or reduce its ultimate liability for plaintiff's damages.

In 1959, as we mentioned, Congress amended § 933(b) in response to *Czaplicki* to provide for an assignment only after six months from an award without suit by a compensated employee. A longshoreman's compensation rights are not *now* "uncertain." See, *Halcyon, supra,* at page 284. An employee *can* exhaust his compensation entitlement through order of the Board without loss of his right to sue by operation of the § 933(b) assignment.

If, as the *Burnside* court held, a stevedore does not have a "lien" on the proceeds of a compensated employee's suit but is, rather, the "owner" of the right to sue a negligent shipowner for its damages (i.e. its compensation liability); and if such right of action is defeated by proof of the negligence of the stevedore employer, by virtue of *Halcyon* as *Burnside* also holds; if, further, the shipowner is, as is clearly the case by virtue of § 905(b), *also* "shielded by" the Act (*Cooper, supra,* at page 110); if *Halcyon* still applies in such circumstances, i.e. if the stevedore must sue to recover its compensation liability and must lose if negligent—then any verdict in the employee's favor will be reduced by the amount of the "lien" upon proof of a degree of stevedore complicity; and this sum would not only be the accrued, but also the future compensation liability of the stevedore

as well. The leverage which will be provided in order to achieve reasonable settlements of third party claims without recourse to suit is obvious. Similarly obvious is the result which obtains if the stevedore has lien rights regardless of negligence. In such instance, even if the longshoreman has been made whole through the statutory compensation scheme, suit will nonetheless be brought in order that the stevedore may recover the lien.

But what must be clearly recognized is that this result may be compelled, in the opinion of the amici curiae, by the law as it now stands and requires fashioning of no "new" rule of contribution. The mistaken concept which is at the root of the present needless inequity is the belief that the stevedore has a "lien" on proceeds of plaintiff's suit (or, an unrestricted right to recovery of compensation expenses despite negligence).

It is the view of amici curiae that *Halcyon* "was" good law on its facts because of flaws in § 933(b) of the Act and that the rule of the case "still is" good law because the Act (§ 905(b)) now forbids contribution for plaintiff's actual damages beyond his compensation entitlement in favor of the ship from the stevedore. Basic fairness therefore should require that the stevedore have no such right against the shipowner. In short, the negligent shipowner should pay plaintiff's real damages, and the negligent stevedore should pay compensation, as Congress intended.[4]

The foregoing analysis has been urged in but one case since passage of the 1972 Amendments. In *Landon* v. *Lief Hoegh & Co., Inc.*, 521 F.2d 756 (2 Cir. 1975), certiorari

4. "It is important to note that adequate workman's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety." Senate Report No. 92-1125, 92nd Congress, 2nd Session (subsection "Safety").

sought on other grounds and denied (423 U.S. 1053 (1976)), the Second Circuit Court of Appeals suggested, but held that it need not decide, that § 905(b) "overruled" *Burnside*. But in this respect and others, the court's reasoning was faulty.[5] Section 905(b) provides:

> In the event of injury to a person covered under this Act . . . then such person, or anyone otherwise entitled to recover damages by reason thereof may bring an action against . . . [the] vessel . . . in accordance with the provisions of § 33 [933] of this Act . . .

Obviously, § 905(b) applies only to injured persons entitled to compensation and others "otherwise entitled." It does not apply, for example, to Jones Act seamen who are not entitled to compensation and who retain a right to sue a shipowner for unseaworthiness for precisely the reason that the Act itself does not apply to them. Section 905(b) also provides that the section is the sole remedy for those to whom it does apply, e.g. a suit for negligence *is* the sole remedy for longshoremen who *are* entitled to compensation. Burnside held that § 933 (as opposed to § 905) did *not* cut off the stevedore's common law right to sue the shipowner for its compensation liability, and § 933 was not significantly amended in 1972. Thus, § 905(b) includes the stevedore as an "otherwise entitled" party or it does not. This, as yet, has not been expressly decided. If it does, the other remedy of the stevedore, its equitable remedy of a lien on proceeds, is cut off and by § 905(b) itself. On the contrary, if it does not, then § 905(b) does not affect the stevedore's

5. In *Landon*, the stevedore's insurer was joined by the shipowner under Rule 19 F.R.Civ.P. as an additional party plaintiff. The basis of this joinder was that concurrent ship and stevedore negligence would result in imposition on the shipowner of liability. The shipowner in that case sought a determination that in such joint negligence cases, the shipowner should only be liable for that portion of a longshoreman's damages award in excess of compensation benefits. The Second Circuit mistakenly viewed the argument as an effort to demonstrate that any stevedore negligence avoided any shipowner's liability.

right to sue the shipowner by virtue of its *Burnside* right, which is not "cut off" by the unamended § 933(b).

In either event, the stevedore can sue the shipowner, and the "lien on proceeds"—based, as we have seen, on the mistaken belief that the stevedore could *not* sue the shipowner because of § 933(b)—can no longer be justified. Moreover, the considerations of policy underlying *Halcyon* and *Pope & Talbot* no longer exist, by virtue not of the 1972 Amendments but the 1959 Amendments to § 933(b) which provided a six months "grace" period following a final determination of a longshoreman's compensation claim.

In view of Congress's expression of concern in respect of the volume of litigation in this area of the law (House Report (Education and Labor Committee) No. 92-1441, Sept. 25, 1972, pp. 4702-03), it is appropriate to make the following comments on the practical implications of continuing the error of assuming that even a negligent stevedore employer has a lien on the proceeds of a longshoreman's suit. Injured longshoremen must now prove notice to the shipowner of the condition causing his accident. Since this condition is often a transitory one, such notice will be claimed through the testimony of plaintiff or his co-employees that they saw the dangerous condition and "told the mate."

Under maritime law, notice to the longshoremen has been held, in the former indemnity context, to be notice to his employer. Thus, by proving plaintiff's case against the shipowner, those who testified for him will supply proof of negligence of the *employer,* which in turn will defeat the employer's claim (in a direct action against the shipowner) to recover its compensation liability. In the typical case today, where the new benefits scheme often results in fully making whole the injured longshoreman, suit would not be

brought if a lien was not thought to exist in favor of a negligent stevedore, since its compensation expenses would not otherwise be recoverable. If, however, the present mistake is perpetuated, suits will be brought and attorneys who will confer absolutely no benefit on their clients, ostensibly the longshoremen, will divide the "lien" (by agreement if not under legal compulsion) with a negligent stevedore.

Amici curiae conclude by noting that the resolution to this vital issue suggested herein has been the law in England since 1911. *Cory & Son Ltd.* v. *France Fenwick & Co., Ltd.,* 1 KB 114. It is also the law in a number of states of the United States, most notably California. *Witt* v. *Jackson,* 57 Cal. 2d 57, 366 P. 2d 641 (1961). See Larson, A. *Workmen's Compensation Law,* Vol. 2, § 75.22 (Matthew Bender 1974); *Brown* v. *Southern Ry.,* 204 N.C. 668, 169 S.E. 419 (1933). Finally, amici curiae point out that between 1956 and 1972, that is during the life of *Ryan,* it was also, effectively, the position of this Court that a negligent stevedore was not entitled to recover its lien but was *liable* to the shipowner for all actual damages recovered by the longshoreman in a third party action.

A lien on proceeds in favor of a negligent stevedore is contrary to considerations of natural justice. It could only have been law if this Court's appreciation of the injustice to parties properly of secondary interest was overborne by a policy decision that such was required to protect the interest of the person for whose benefit the Compensation Act was written and who had been guaranteed by Congress both a right to compensation and damages. Amici curiae submit the *Halcyon* and *Pope & Talbot* results would not have been reached had this Court in 1952 and 1954 been dealing with § 933(b) as amended in 1959.

The *Ryan* indemnity right was all that was overruled by Congress in 1972. Other aspects of this Court's holding in *Ryan* abide; for example the *Ryan* warranty of workmanlike service survives. *Fairmount Shipping Corp.* v. *Chevron Int. Oil Co. Inc.*, 511 F.2d 1252 (2 Cir. 1975). So does the tacit *Ryan* holding that a negligent stevedore cannot recover its "lien." This is so for two reasons: (1) Congress in 1959 amended § 933(b) to conform it to the *Ryan* holding and (2) nothing done by Congress in 1972 suggests that it *even considered* the question whether a negligent stevedore has a lien on proceeds of a longshoreman's suit.

Despite amici curiae's belief that it truly has taken no position on the merits of the question presented by petitioner i.e. whether his attorney is entitled to charge the stevedore for recapture of the "lien," amici curiae's belief that petitioner's damages is only the excess of the settlement over the amount of compensation received necessarily raises issue of the appropriateness, in the first instance, of applying the contingency agreement to the gross settlement. It would also appear that the agreement of amicus, the Master Stevedore's Association that this is inappropriate acknowledges its correct understanding that the damages of petitioner were not $60,000 but $60,000 less the "lien."

CONCLUSION

For the foregoing reasons, the existence of a lien in favor of a stevedore in all instances cannot be decided by this appeal and should be reserved for determination by the Court in a future and proper case.

Dated: New York, New York
November 30, 1979

Respectfully submitted,

HOLLIS M. WALKER, JR.
Attorney for Amici Curiae Hudson Waterways Corporation, Cove Shipping, Inc., Sea Train Lines, Inc., Apex Marine Corp., Moore McCormack Line, Inc., and United States Lines, Inc.
40 Wall Street
New York, New York 10005
(212) 344-4700

JOSEPH T. STEARNS
WALKER & CORSA
Of Counsel